

Insurance Counsel Journal

October, 1935

VOL. II

No. 4

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J. ROY DICKIE,
President, International Association of Insurance Counsel



The President Speaks

*To the Members of the
International Association of Insurance Counsel:*

First I wish to express to you my appreciation of the high honor which has been conferred upon me in my election to the Presidency of the Association and of your confidence in me manifested by such election. As I stated at the Convention I am fully aware of my comparative inexperience and consequent lack of that thorough knowledge of all the activities of the Association which is most desirable in a presiding officer. I wish to assure you, however, that I shall endeavor at once to qualify myself for the discharge of the duties of this high office and that nothing shall fail for want of effort, application and diligence, and I am sure that the other newly elected officers and members of the Executive Committee join me in this pledge to the members. We are your servants and will be responsive to your direction, but we can accomplish little or nothing without your active and loyal cooperation.

I find that one of my first duties is the appointment of Committees, including a Membership Committee and a Legislative Committee for Canada and each of the states. At no distant date many of you will receive notice of appointments on these Committees and I urge upon each of you so appointed that you accept willingly and that you give faithful attention to the discharge of your duties as such Committee member. We have about eleven hundred members but there are many more worthy lawyers on the legal staffs of the Companies and in active practice in the field who should be members of our Association. We should extend to our brethren of the bar, qualified in accordance with our By-Laws, a cordial invitation to join us in our great work, without, however, sacrificing quality to quantity.

The work of the Legislative Committees is exceedingly important. Insurance Companies have been made the target of much projected vicious legislation. In our several states we must be alert to promote the passage of desirable statutes and to prevent the passage of those that are undesirable. In this field we may point with pride to the assistance we have rendered to the insurance companies and through them to the public. The last report of our General Legislative Committee gives but a glimpse of the work performed by it and the State Committees, but if the Association had done nothing else its service in this field during the past year would have furnished ample justification for its existence. Let us continue this splendid work.

That the work of the Association may go forward harmoniously and efficiently is my supreme thought and desire. It will do so if we keep always before us the purpose of its organization. I suggest to each of you that you read again Article II of the By-Laws wherein the purpose is stated.

Sincerely yours,

J. ROY DICKIE,

President.

Officers and Executive Committee

1935-1936

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PURPOSE

The purpose of this Association shall be to bring into closer contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, who are actively engaged wholly or in (substantial) part in the practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

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REPORT OF MEETING OF EXECUTIVE COMMITTEE

A meeting of the Executive Committee was held at 2:30 Friday, August 30th, 1935, President J. Roy Dickie presiding. All members were present. Committee authorized and instructed Secretary to collect all dues and handle all membership applications. Finance Committee, composed of Harry S. Knight, Garner W. Denmead and George L. Naught, was appointed by the President. Finance Committee was directed to arrange for bonds for both the Secretary and Treasurer and transfer of Association funds to approved depositories. Committee authorized continuance of Membership, Legislative and all committees until new committees are appointed by the President. Authorized President to appoint a Public Relations Committee. By resolution Committee continued former Editor of Journal. Appointment of Executive Secretary was discussed, but no final action was taken. Editor of Journal was instructed to prepare index of speeches and papers appearing in 1935 October Journal and former issues of Journal and Year Books and publish same in 1935 October Journal.

* * *

MEMBERSHIP CHECK INDEX

Editor of Journal requests membership to scan index of former addresses and advise him whether or not there is a general desire to have any of these former addresses printed in subsequent issues of Journal and whether or not they should be printed in full or con-

densed. If there is a general demand for any of these addresses to be reprinted, it is the intention of the Journal management so to do.

* * *

NOVEL, INTERESTING DECISIONS

Editor expects the membership to keep the Journal office advised of novel and unusual decisions which will be of general interest to the members. Due credit will be given to the forwarder of such decisions when and as they appear in the Journal. General suggestions and criticisms in reference to the Journal will be gladly received from members.

* * *

JOURNAL BINDERS

Editor now has a number of samples of a permanent binder for Journals. Full and complete information will be furnished membership in the January issue of Journal. Members, however, who desire to obtain a binder at an early date may secure information from the Journal office within the next thirty days as to when and where the binder adopted by the Executive Committee may be secured and the cost thereof.

* * *

AUGUST MEETING AND NEW OFFICERS

The members who attended White Sulphur meeting know that the meeting was the best attended, the most pleasant, the most successful and enthusiastic that the Association has ever enjoyed. Your Editor has had the privilege of attending every meeting of the Association since 1928. The White Sulphur meeting without doubt was the greatest of them all. It was apparent that the Association had arrived and that its high purpose, its accomplishments and its standing in insurance circles were recognized. The Association is fortunate in having selected as its President Mr. J. Roy Dickie, one of the leading insurance lawyers of Pittsburgh, Pennsylvania. Mr. Dickie has been a member of

this Association, according to records in the Editor's office, since 1928, and he has been an active and enthusiastic member. He is a progressive, though conservative. He has a thorough knowledge of the Association and its history and a keen and proper vision of its future. He is prepared at a personal sacrifice during his administration to give the Association the time and thought and attention which his office requires. The Association and Mr. Dickie are also fortunate in the election of a Secretary, Treasurer, Vice Presidents and an Executive Committee who are equally as enthusiastic and equally as instilled with the great purposes of the Association and its work and who will cooperate with President Dickie to the fullest. Your Editor, therefore, urges the membership and the members of the committees which he is shortly to appoint to give your President and your officers wholehearted and enthusiastic cooperation. No officer of the Association, including Editor of Journal, receives a salary. They give their time to the Association because they believe in it. This is an additional reason why, when called upon, the membership should gladly cooperate with officers in their unselfish undertakings in behalf of the Association.

* * *

REDUCING CASUALTY LOSSES

Alabama now has a Guest Statute and a Driver's License Law. A step in the right direction.

* * *

JOURNAL

Members who have misplaced one or more of their Journals and desire to complete same for binding may obtain the missing copy or copies by writing Journal Office. Members who only pay \$3.00 dues should immediately send in \$2.00 for one year's subscription to the Journal.

BARGAIN: All new subscriptions to Journal received within the next sixty days will entitle the subscriber upon request, in addition to the current issue of the Journal,

to back issues without cost until the supply in Editor's office is exhausted.

* * *

COMPANIES MAY REDUCE LOSSES BY AGENCY COOPERATION

Your Editor had the pleasure a few days ago of attending a meeting of production agents presided over by home office vice-presidents of the company represented by the agents. One year ago a similar meeting was held, at which time agents were acquainted by home office executives with the fact that business in the territory was unprofitable, and that company might have to withdraw from the territory. The agents at this meeting were fully acquainted with home office problems and the difference between profitable and non-profitable business; were shown how agents could cooperate to place business on a profitable basis. It appeared as a result of former meeting and subsequent cooperation by agents that the business from the territory comprising several states had within less than a year been changed from the decided red to black, that is instead of showing a prohibitive loss the business was now profitable. Being a listener at the meeting and somewhat of an outsider to the problems under consideration, your Editor was profoundly impressed with the handling of this bad situation by the insurance company.

The thought occurs to your Editor that if home office officials of the type that would inspire the local representatives of the company would periodically visit divisions of the company territory and hold similar meetings that they would give their agents the home office underwriting point of view, cause them to become home office conscious and know that they, by their underwriting, controlled in a large measure the profits and losses of the company. Agents often forget the problems of the home office and look only to the volume of business produced and the commissions obtained. This type of agent invariably produces a class of business with an excess loss ratio.

Annual Meeting of International Association of Insurance Counsel

PROCEEDINGS AND ADDRESSES

WHITE SULPHUR SPRINGS,
WEST VIRGINIA

August 28, 29 and 30, 1935

THE Fifteenth Annual Convention of the International Association of Insurance Counsel was called to order at the Greenbrier Hotel, White Sulphur Springs, West Virginia, at 10:15 A. M., Wednesday, August 28, 1935, President Walter R. Mayne, of St. Louis, Missouri, presiding.

PRESIDENT MAYNE: This is the Fifteenth Annual Convention of the International Association of Insurance Counsel and it is indeed a pleasure to see you all here. I believe we will have a very eventful meeting.

It is a great honor that we have the Governor of West Virginia with us and it is a pleasure to call upon Governor Kump, of West Virginia. Governor Kump. (Applause as all stand.)

GOVERNOR KUMP: Mr. Chairman and gentlemen of the Convention:

You are indeed all very gracious and I appreciate it. We are happy here in West Virginia to have you meeting within the limits of our state and at this great resort in which we think we are entitled to have just pride. We hope that your visit here will be pleasant and profitable and when I look over this company and observe its personnel, I think I may say with assurance, Mr. Chairman, that your meeting will be successful.

I was somewhat taken off my feet in the corridor of the hotel this morning, in talking with some friends, when a gentleman came by and I understood him to say that he was the "solicitor" of this Association. I congratulate you, gentlemen, upon having a solicitor.

Now, I am a cross-roads country lawyer, living in a little town upon the top of the mountains of this state, that section to which we refer as the "top of the Mountain Section." You are in it here now.

There are many things that we do not have that we wish were ours at this time, in order that we might give them to you, but the best that we have is yours. I think perhaps here

we know something of the problems that you gentlemen are confronting just now in advising your respective companies how they may find suitable investments to protect those who rely upon your clients, to see to it that when they have gone West, as it was stated a few years ago and as we refer to it, that their loved ones might be assured that a competence was theirs. I know the difficulty you are having in finding investments and advising your companies in these troublous, restless times of dislocation. I have been having some little difficulty along that line myself. Lest perchance you should think that I am speaking of my own personal affairs, I want to assure you that I am speaking in terms of the public when I make that statement. I have been having something to do with legislatures recently and I have learned, as many other Americans have learned, that as we deal with legislative bodies, it is well to keep an ear, and sometimes risk an eye, upon the courts as well, but I am quite sure that you gentlemen are capable and that you find many ways in which you keep your clients out of the courts, so I will not talk to you about that.

I do want to talk to you for a moment about the state in which you are meeting. When I said to you that we were honored to have you here and that it was a pleasure to have you, I spoke the very truth that is in my heart. I want to tell you about the county in which this great all-the-year-round resort is located, Greenbrier County. You know about the blue grass of Kentucky. My friends, it is an absolute fact that there are more acres of blue grass in Greenbrier County than in all the State of Kentucky. (Laughter.) If you have any doubt about what I am saying to you, drive over towards Charleston, upon this great cross-state highway that passes through the grounds of this resort, through Lewisburg and on toward the great Kanawha River, that industrial empire that a few years ago was referred to by a great American stat-

istician as possessing more of natural resources than any other section of the same space and area to be found in all of this country.

And then, my friends, stop at the Greenbrier Valley Fair over at Lewisburg, where 20,000 people will gather this afternoon and where many fine horses and many other attractions will be found, chief of which will be the representation of West Virginia's matchless womanhood. That will be there in all its beauty and its glory. Go over, gentlemen. It will be worth your while.

And then another thing. In West Virginia, finished upon grass, the blue grass of which I have spoken, are the only cattle prepared for the export markets anywhere in this country. Oh, I know about the corn-fed cattle of the Middle West and of the splendid ranges of the West, but not a single one of them finishes cattle for export upon grass. Yonder in Lewis County of this state, and in Harrison County, and here in Greenbrier, cattle are finished, and they command the highest price upon the export markets of the world.

Now, perhaps you think that I am indulging somewhat extravagantly in the excellence of the State of West Virginia. There are a few other things in West Virginia that I might mention to you and there is one of perhaps equal attraction to any that I have mentioned except our charming, cultured, gracious womanhood, and it is this: Yonder in Pendleton County of this state is the Smoke Hole. I observe the smiles going around. That is right. The best moonshine liquor made anywhere in the United States (laughter) is to be found there. Help yourselves, gentlemen, and I know full well that after you have tested its excellence—and I am testifying upon the evidence given me by Tom Jackson and George Couch, who sit somewhere here; I do not know about it myself (laughter), but, upon information, I give you the evidence that this is the best liquor that we have; and we have the best that is to be found anywhere.

Gentlemen, again it is a pleasure to have you here. It is fine of you to come. I am sure, after this occasion and after this splendid Convention has completed its deliberations, after you have had the opportunity to mingle with the citizenship of the State of West Virginia, those of you who come from every section of the great American Commonwealth, and after you have met our ladies and gone up to the Smoke Hole, you will wish to come back, and we want you to come back,

and may God bless you and keep you. I thank you. (Applause.)

PRESIDENT MAYNE: It is a pleasure to have here the President of the West Virginia Bar Association and we would like to hear from Mr. Frank C. Haymond. (Applause.)

MR. HAYMOND: Your Excellency, Governor Kump, distinguished guests and members of the Association:

I assure you it is a real pleasure for me to have this opportunity, on behalf of the West Virginia Bar Association, to extend to you cordial greetings and to welcome you to old White Sulphur Springs and to West Virginia.

As Governor Kump has said, we in West Virginia, particularly we lawyers, are honored by the presence of this splendid group of representative and distinguished insurance lawyers and counsel from various parts of this country, and it is indicative to me of the deep-seated feeling of mutual friendship that exists between the people of your respective communities and of my great state that this Association has decided to hold its Fifteenth Annual Meeting in West Virginia, and we are truly delighted to welcome you as our honored guests.

We welcome you to our midst, not merely as citizens of neighboring states, not merely as fellow Americans, and not solely as warm friends, although you are all these and more, but we lawyers of West Virginia welcome you most cordially as fellow members of an ancient and an honorable profession, engaged in the discharge of the responsibilities which come to us daily as lawyers.

We are always glad to have you in West Virginia, where you sometimes meet, but we are particularly happy to have you with us in this Centennial Year of the death of the illustrious Chief Justice Marshall. One hundred years ago, as you know, the first Memorial by the Supreme Court of Appeals of Virginia to that distinguished jurist was held in old Greenbrier County, which Governor Kump has extolled and where you are now meeting, at a point only eight miles distant at Lewisburg, where the Court of Appeals was then in session, and where it, in solemn ceremony, paid tribute to the life and the labors of the great Chief Justice.

Let us now, today, as lawyers of America, who hold the same traditions, who claim a common heritage, who believe in the same views of government and who profess the

same loyalty to the Constitution, again dedicate ourselves to the Constitutional ideals of Marshall, who, more than any other American, made the Constitution the great Charter of Individual Liberty beneath whose protecting shield the United States of America has become a truly great and really free nation. (Applause.)

We welcome you, gentlemen and fair ladies, to the natural beauties and social attractions of old White Sulphur Springs, known to and enjoyed by the peoples of this country throughout its long history. We trust that your visit with us will be both pleasing to you and beneficial. In your deliberations, in your meetings, you will of course devote your time and attention to serious subjects, and I predict that from these deliberations there will radiate certain influences and inspirations which will bring you added courage and wisdom to enable you to solve with enlightened vision and sound judgment the perplexing problems which daily confront us in the practice of the law.

In your moments of relaxation, it will be our sincere pleasure to endeavor to entertain you, and we trust that you will become better acquainted with this beautiful section of our state.

In conclusion, may I express the hope that when these sessions will have ended, you will carry away with you to your homes and your firesides pleasant recollections of your visit in West Virginia. I assure you that we will ever recall you as most delightful and attractive guests. (Applause.)

PRESIDENT MAYNE: Thank you, Mr. Haymond.

It is with regret that I have to announce that Mr. John S. Leahy of St. Louis could not be here, but he advised me by telegram yesterday that he had an infected throat and his doctor would not permit him to come here. He was to respond to the address of welcome of Governor Kump. He has, however, sent his address, so we all know that he really wanted to be here and was prepared. Under those circumstances, I am going to ask Mr. Wayne Ely, of St. Louis, who knows Mr. Leahy, as a brother lawyer, to read Mr. Leahy's address. Mr. Wayne Ely.

MR. ELY: Mr. President, your Excellency, and Mr. Haymond: I can well believe Governor Kump's statement that there are more acres of blue grass in Greenbrier County than in all of Kentucky, because I drove over here from Charleston yesterday and after

corkscrewing up one thousand-acre tract that stood perpendicularly and then sliding down another and finding a sign at the bottom of the hill that I was now going to proceed over a winding road, I believe that they can get ten or twenty times the average 640-acre section in a square mile of land in this country. But it is truly a beautiful drive and it ends at a beautiful place.

Mr. Mayne handed me this address which was prepared by a good Republican friend, and he handed it to me, I trust equally as good a Democrat, to read. I have read the first few pages and haven't found many things wrong with it, so I will proceed to go through the rest of the address. (Mr. Ely read Mr. Leahy's prepared paper, which will be found on page 30. Applause.)

PRESIDENT MAYNE: Thank you, Mr. Ely.

Under the By-Laws, one of the onerous duties of the President is to inflict himself upon the members of this Association by making an address, and the subject that I am going to address you upon is going to look into the future. My title is, "Looking Forward." (President Mayne read his prepared address which will be found on page 32. Applause.)

As the next speaker on the program, I have the great honor of presenting Mr. Joseph H. Collins, of the General Counsel's Staff of the Metropolitan Life Insurance Company of New York. I have known Mr. Collins for many years and it is indeed a pleasure that we are going to hear from him this morning. Mr. Collins. (Mr. Collins then delivered his prepared address which will be found on page 39. Applause.)

Thank you, Mr. Collins.

Before we adjourn, the Secretary will have a few announcements to make. Mr. Millener.

SECRETARY MILLENER: Gentlemen, I have been asked to announce a few matters on the social program. All lawyers, whether they are members of this Association or not, are cordially invited to attend our sessions.

The ladies have asked me to announce that in the afternoon there is tea served along about 4:00 o'clock each afternoon.

The swimming pool is available to all our members, their wives, daughters and sons, without charge.

The Greenbrier County Fair is being held about six or seven miles from here. If anyone wants to attend that, they tell me it is well worth attending.

This week there is being held here what is known as the Robert E. Lee Anniversary program and our members are cordially invited to participate in all those festivities.

This afternoon the ladies have planned a luncheon at the Kate's Mountain Club, and carriages or automobiles will leave the hotel promptly at 1:00 o'clock. There is to be a luncheon at 1:30 at this mountain resort. We would appreciate it if you would inform your wives and daughters that if they would care to attend that, they are cordially invited.

Mr. Mayne has just called to my attention that I have overlooked a very important announcement. We have arranged to have a cocktail bar set up in a private room just outside of the dining room on each evening, and that room will be open at about 6:00 o'clock. We will have some punch and other beverages there that you can indulge yourselves in. The purpose of it is to get you together and have you get acquainted and get you mixed up, so you will know one another.

PRESIDENT MAYNE: Just a minute, gentlemen. There is another announcement to be made before we adjourn. Mr. Dickie, will you please make it?

MR. DICKIE: Gentlemen, the Golf Tournament will be held tomorrow afternoon on what I believe is known as the No. 3 Course.

The trophies are on exhibition on a table outside of this room.

PRESIDENT MAYNE: Thank you, Mr. Dickie.

In connection with the Golf Tournament, on the program there is a Bridge Tournament for the ladies, and I would appreciate it if you would kindly call that matter to their attention. I want to add that the men who do not play golf who desire to play bridge will have an opportunity to do so, and they can be in this tournament as well as the ladies.

MR. DICKIE: Your greens fees and caddy fees will be paid for by the Association. Perhaps that is important. That is for the Tournament tomorrow.

PRESIDENT MAYNE: Gentlemen, we will adjourn at this time until 2:30. Try to be prompt, because we want to finish the program as soon as possible this afternoon, so we may enjoy ourselves in other things.

Recessed at 12:52 P. M.

Wednesday Afternoon

The second session, Wednesday afternoon, was called to order at 3:05 o'clock, President Walter R. Mayne presiding.

PRESIDENT MAYNE: The afternoon session of our Convention will please come to order. As we have more of the members here than we had this morning when we made the announcements, I would like to again announce that this evening, between the hours of 6:00 and 7:30, we will have a Cocktail Hour, where we want you all to attend, bring your wives, your daughters and sons, come in and fraternize and make yourselves perfectly at home and become acquainted with the membership of our organization. In the past, it has been the custom that a few of us would congregate in the rooms and we would stay there; we would like to have had everyone there but we just didn't have the room to accommodate you, and, for that reason, we have now developed the plan that if we have one assembly place where we can imbibe in a little bit of cheer, I am sure everyone will make each other happy.

MR. M. B. HARLIN: Mr. President, I want to thank you very much for making that announcement a second time. (Laughter.)

PRESIDENT MAYNE: I'll make it a third time if it will add to your enjoyment. That room will be near the dining room and I am sure that you will see the multitude going there, so just follow the leader.

MR. YANCEY: Mr. Mayne, will you have tea for some of us who don't indulge in anything stronger?

PRESIDENT MAYNE: There will be tea and coffee for those who may not enjoy the other liquid refreshments.

MR. BROSMITH: One question more: How about the Dinner Dance?

PRESIDENT MAYNE: The Dinner Dance will be held this evening. We want you to come in and dance with the ladies of the members of our Association. It is not formal. You may make it so if you desire, but if you do not know a lady and you are a member of the organization, go up and introduce yourself. I have spoken to all the ladies and they said it is perfectly all right.

We will change the order of the program this afternoon for the accommodation of a man whom we all love and think a great deal of. Our first speaker will be Mr. Frank J. Roan, Second Vice-President of the Commercial Casualty Insurance Company, and his subject will be, "To Our Trial Counsel, the Compliments of the Home Office." It is a great pleasure to have Mr. Roan here with us and I am sure that he is going to deliver

a message to us that we will take back home with us and we will long remember. Mr. Roan.

(Mr. Roan then delivered his address, which will be found on page 100. Applause.)

PRESIDENT MAYNE: Thank you, Mr. Roan. I am sure we enjoyed your message.

MR. KNIGHT: Mr. Chairman, if it is in order at this time, I would like to suggest, without burdening the record with a motion, that the last speaker have presented to him from the record a transcript of that part where he promises to pay more in the future, and where he says that he speaks for the balance of the companies, and have him certify to it and have it sent out to our members.

MR. YANCEY: I second the motion.

PRESIDENT MAYNE: Your suggestion is very apropos and that will be the order of the day.

There has been so much said about the New Deal that if I may divert—I have told this story to several members here, but if some of those who have already heard me will forgive me for telling it again, I would like to repeat it here. It seems there were several farmers discussing the New Deal and the various alphabetical departments, the CWA, the PWA, the AAA and so on, and one of them said, "Yes, they are great things but we don't know what they all mean by these initials." He said, "I just see a picture in the paper here. Now, take this man Tugwell. He is supposed to be the Brain Truster of the Administration and here he has his picture in the paper with all these initials after his name. He has a B.S. and an M. S. and a Ph.D. Now, what I would like to know is, what do all those letters mean?"

The other farmer said, "Well, I think you ought to know what B.S. means."

He said, "Well, I guess I do if it is the same thing you are thinking about."

He said, "Well, that's it." He said, "Well, what is this M.S.? What does that stand for?"

The other one said, "Oh, that is just More of the Same Thing."

"Well," he said, "how about this Ph.D.?"

He said, "Oh, that's just 'Pile it Higher and Deeper.'" (Laughter.)

The next speaker on the program is Mr. Lionel P. Kristeller, of Newark, N. J., and we will be delighted to hear from Mr. Kristeller. His subject is, "The Mortgagee Under the Standard or Union Mortgage Clause,

Some of His Rights and Liabilities." Mr. Kristeller, we are glad to see you. (Applause.)

(Mr. Kristeller then delivered his address, which will be found on page 66.)

PRESIDENT MAYNE: You have heard the suggestions of Mr. Kristeller. The meeting is open for any comments regarding the paper or any questions that may be asked concerning this subject. If anyone wants to be heard, be very free to proceed.

Mr. Kristeller, we thank you for your paper. (Applause.)

MR. BROWN: Mr. President, I move the suggestion made by the speaker be referred to our Committee on Fire and Marine Insurance.

PRESIDENT MAYNE: I feel that is a very good suggestion. Mr. Kristeller has outlined what he thought our Association should try to do and it is a matter that our Fire and Marine Insurance Committee should give serious consideration.

Is there a second to Mr. Brown's motion? (The motion was seconded.) It has been moved and seconded that the suggestion made by Mr. Kristeller in his paper be referred to the Fire and Marine Insurance Committee. Are you ready for the question? All those in favor, say "Aye." Contrary. It is so ordered.

We will now hear from Judge Powell, who will give the report of the Executive Committee.

Report of Executive Committee Meeting

JUDGE POWELL: Since the last meeting of the Association, formal sessions of the Executive Committee have been held as follows: At French Lick Springs, Indiana, immediately following the adjournment of the last meeting of the Association. At New Orleans, Louisiana, for two days in January, 1935. And last night until 2:00 A. M. in this hotel.

Synopses of matters acted upon at the meetings prior to last night have been published in the Journal. Hence, this report deals for the most part with matters dealt with at the last meeting. However, many of these matters will be dealt with in other reports and reference to them will be omitted here.

Unauthorized Practice of Law

Last night a resolution was adopted directing the President to appoint a special committee to be denominated as the Committee on the Unauthorized Practice of the Law, to act with the President, to study the subject

of unauthorized practice of the law as applied to insurance, and to report thereon to the Executive Committee, but, in case of emergency, to have the power to take action prior to the next meeting of the Executive Committee.

Now, speaking by way of explanation and beyond the formal report, I wish to say in behalf of the Executive Committee, and somewhat to allay the apprehensions of some of the members and insurance companies who may fear that an extreme or unintelligent dealing with this subject in some of the states will result in serious harm to the companies, and who may not know that the Executive Committee has taken notice of the problem, that the Executive Committee is aware of the serious nature of this problem and is endeavoring to deal with it in an intelligent manner and in such a way as will best comport with the best interests both of the legal profession and of the insurance companies.

Valueless Law Lists

In the January issue of the Journal there was a warning to the membership on the subject of fraudulent and valueless law lists. The Executive Committee again warns the membership that a number of the law lists to which attorneys are solicited to subscribe are wholly without value and some of them grossly fraudulent.

Speaking personally, and not as a part of the formal report, I may say that personal observation and a study of the investigations made by the Executive Committee and a special committee of the Association of which Mr. Ernest Woodward was Chairman, leads me to believe that the money spent by lawyers for listing in most law lists is almost wholly wasted. If members of the Association continue to be duped into subscribing to fraudulent and worthless law lists after the repeated warnings given them through this Association, they must seek a doubtful consolation from that time-tested maxim that "A fool and his money are soon parted."

I may say further that the most legitimate, ethical and valuable means a lawyer may adopt to advance his professional career and welfare is through constant attendance upon his local, state and national bar associations and upon special associations such as the International Association of Insurance Counsel.

Federal Interpleader Act

The following resolution, offered by Mr. Harry S. Knight, was approved by the Executive Committee and is brought before this Association for its action, to-wit:

"The Executive Committee of this Association, having hitherto approved the passage by the Congress of the United States of an act known as the Federal Interpleader Act;

Be It Resolved, That this Association does now add its approval to that of the Executive Committee."

The Committee has asked me to supplement the formal report on this subject with a further word of explanation.

It happens that during the last two years, I have been Chairman of the special committee on Federal Interpleader legislation of the Insurance Section of the American Bar Association, and at the time this special committee was appointed, bills were pending both in the Senate and the House designed to amend and to broaden existing federal statutes relating to actions of interpleader by insurance companies.

Early last year, of this Special Committee, Professor Z. Chaffee, of Harvard, who had studied the subject intensively, Mr. W. Eugene Stanley, of Wichita, Kansas, and I met in Washington and agreed with Senator Hebert, of Rhode Island, author of the Senate Bill, on a substitute which makes the Act far more comprehensive than originally planned. The Act as redrawn covers all situations where bills of interpleader, or in the nature of interpleader, are useful, not only to insurance companies but to all others in need of such relief, and the practice in this class of cases is greatly liberalized. The Bill failed to pass at the 1934 session of Congress, largely because of the illness of Senator Hebert. It was introduced again this year and passed the Senate unanimously. A few days ago, General Washington Bowie, Jr., of Baltimore, a member of the Committee who has been watching the bill at Washington, reported to me that it had passed the House Committee without objection and had a place on the consent calendar. I had marked on my notes that I didn't know whether it was caught in the confusion of the closing session or not. I have a telegram just furnished me by Mr. Hervey J. Drake, stating—from his correspondent in New York—"Federal Interpleader Bill not enacted. Passed Senate favorably; reported House." So, evidently, it was not passed on account of being caught in the congestion.

I would express the personal hope and wish that the members of this Association, wherever they can, with their Senators and Representatives, will speak a good word for this

Bill, which adds to the present jurisdiction of the Federal Courts a jurisdiction that state courts can't exercise because they can't get service of process on the parties, and which the Federal Courts are constitutionally authorized to exercise but are not exercising merely on account of the failure of Congress to pass the Bill to create the appropriate machinery.

Secretary's Salary

Now, continuing with the report of the Committee, at the meeting of the Executive Committee held at French Lick Springs last August, at the close of the session of the Association, the Executive Committee fixed the salary of the Secretary at \$2,000.00, plus an allowance for clerical help. The members of the Committee understood that this was with Mr. Millener's consent, but shortly later, Mr. Millener advised the Committee that his salary had been previously fixed at \$3,250.00 per year for the rest of his term and that he did not consent to the reduction.

At the Mid-Winter meeting of the Executive Committee in New Orleans, a subcommittee was appointed to investigate Mr. Millener's contention. At the meeting of the Committee last night, this sub-committee reported, in substance, that it was so difficult to ascertain from the state of the records just what had been done in this respect that the subcommittee recommended the giving of the benefit of the doubt to Mr. Millener and the payment to him of the \$1,250.00 additional claimed by him, provided that this would forever end the matter and that no question of the power of the Executive Committee to fix the salary in their discretion from year to year should ever hereafter be made.

By a divided vote, the report of the subcommittee was adopted and, unless the Association itself sees fit to instruct the Committee otherwise at this session, it will take that course.

Admission New Members

This ends the formal report, but I wish to add one thing more for the information of the members. The present size of the Association and other considerations have led the Executive Committee to be very strict in the admission of new members and rigidly to enforce the conditions of eligibility stated in the By-Laws. A considerable proportion of the applications for membership before the Committee were not favorably entertained, so that the applicants were not elected. This does not mean that these applicants were not of

high personal and professional character but merely that the Committee did not deem them eligible for one reason or another.

The Committee does not require that an applicant devote all of his time to insurance work, nor even substantially all of it, but he must have such insurance connections as to identify himself in the minds of the bar and of the public as an insurance lawyer, from the standpoint of representing the companies, and of having real and substantial interest in working out their problems. He should be one who performs a higher class of legal services for the companies as distinguished from a mere claim agent or an adjuster or one who merely handles suits on premium notes or mortgage foreclosures and matters of that kind.

The Committee is also striving to keep the personnel of the membership high, to make it a mark of honor and ability to belong to this Association—to make it an effective association of real insurance lawyers. (Applause.)

PRESIDENT MAYNE: Thank you, Judge Powell.

What is the pleasure of the Convention with the report of the Committee?

P. N. BROWNE: I move it be adopted as read.

PRESIDENT MAYNE: Does that include the adoption of Mr. Knight's motion in there with regard to endorsing the Federal Interpleader Act?

MR. BROWNE: I accept that.

The motion was seconded by Mr. Ruark.

PRESIDENT MAYNE: It has been moved and seconded that the report of the Executive Committee, as presented by Judge Powell, be adopted in toto. That includes the recommendation or the resolution of Mr. Knight with reference to the endorsement of the Federal Interpleader Act. Are you ready for the question? All those in favor, signify by saying "Aye." Contrary. It is so ordered.

We will next have the report of the Secretary and Treasurer, Mr. Millener.

(Secretary-Treasurer Millener read his report which will be found on page 108.)

PRESIDENT MAYNE: You have heard the report of the Secretary and Treasurer. What is your pleasure with reference thereto?

MR. DUKE: I move it be accepted and filed.

With reference to the Year Book, I think everyone in the Association has missed the

Year Book, but after thinking the matter over, the thought has occurred to me that it is really more convenient to have that Year Book published in the magazine form, for two reasons. The first is, I think all of the members probably keep the Journal as it comes out. It takes less space than the Old Year Book, which was considerably smaller and, hence, required more shelf space, which is always at a premium, with all the books we have to have. We like to have them always close at hand and as time goes on, it is going to be impossible to keep them always close at hand.

PRESIDENT MAYNE: Mr. Duke, it is my intention to call upon Mr. Yancey and I believe he will explain to the members the question of the editorship of the Journal and also the reason why the Year Book was discontinued and combined with the Journal. If you will permit, we will first take up the motion that the report of the Secretary and Treasurer be approved and filed and then we will go on to the question of the Year Book after we hear from Mr. Yancey. Is that satisfactory to you, Mr. Duke?

MR. DUKE: That is perfectly satisfactory. While I was on my feet, I felt that I just had to explain how I felt about the Journal and about Mr. Millener and his work. I apologize for taking up so much time.

PRESIDENT MAYNE: That is quite all right, Mr. Duke.

Are you ready for the question on the motion to approve and file the Secretary-Treasurer's report? All those in favor, please signify by saying "Aye." Contrary. It is so ordered.

Now, Mr. Yancey, will you kindly tell us about the Journal. And, in passing, I want to say that in the past year I have received tremendous support from Mr. Yancey. He certainly has done a fine piece of work with reference to the editorship of the Journal. (Applause.)

MR. YANCEY: President Mayne and Members of the Association: Last year upon retiring as President of this Association I felt that as I was relieved of all responsibilities I could really enjoy the Association and the annual meetings. Your Executive Committee, however, which met immediately following adjournment of the annual meeting, saw fit to request me to continue the publication of your Journal. With the assistance of the membership and the advice and direction of your officers, I have since last year's meeting

gotten out four issues of the Journal, which have been mailed to the membership and others interested.

I wish to thank all of those members who have shown a keen interest in the Journal by from time to time sending me copy and making suggestions as to the contents of the Journal. I hope the membership will in the future take even a keener interest in the Journal and thereby assist your Editor, whoever he may be, in getting out a Journal which will be a real credit to this Association.

Your Executive Committee, in placing me in charge of the Journal for the year just ended, fixed a sum not exceeding \$3,000.00 to cover the total expense of the publication. I am indeed happy to report to you that the total cost of the Journal for the year just ended was \$1,994.38.

As my term of office now expires, may I make a few recommendations to the Association in reference to the Journal:

1. That we continue to publish in the Journal first appearing after our annual meeting the proceedings of the annual meeting and the addresses delivered at the meeting.

2. Provide for a binder for the Journal, and advise members interested how and from whom same can be obtained.

3. Beginning with the October, 1935, issue of the Journal, and each year thereafter, publish as a part of the Journal a cumulative index of all articles appearing therein and which have appeared in previous journals.

4. Should it appear that a sufficient number of members have retained their Year Books containing addresses delivered at our meetings since and including 1928, that these addresses be also included in the index.

5. That Editor, under the direction of the Executive Committee and the President of the Association, be given authority to designate a member in each geographical section of the United States and Canada whose duty it will be to assist the Editor-in-Chief and keep him informed of the decisions of interest in their respective sections of the United States and Canada.

Roster

While I am on my feet, permit me, Mr. President, to call attention to the 1935 roster. For some reason, I don't know why except that I believe the cost of publication of the roster in Birmingham was found to be much cheaper than in other places, I was called upon to prepare a new roster. You will recall in the April issue of the Journal there ap-

peared a notice to the membership that a new roster of the membership would be compiled at an early date, and a request to all members to advise me as to whether or not their names appeared properly in the published tentative roster, and to advise me of suggested changes. I was very happy, indeed, to receive more than eighty letters, because that convinced me that at least eighty men in our organization had scanned the Journal. In these letters members advised of changes they desired, the misspelling of their names or of the fact that their addresses or firm name was not correctly stated. The roster was then revised according to states. We then prepared our first alphabetical list of members.

Please keep your Secretary and Journal office advised of any change in address or listing desired.

MR. JAMES: Mr. Yancey, what do you think of the idea of publishing a list of the membership in the Journal once a year, in addition to a roster?

MR. YANCEY: I approve your suggestion.

JUDGE POWELL: Mr. Yancey, may I suggest one thing? That is that, as new members are elected, the next issue carry the list of them and not make us wait until next April to know that they have been elected. As members are elected, take them in quarter by quarter instead of waiting until the end of the year.

MR. YANCEY: I think that is a good suggestion, Mr. Powell, and I would recommend that you call that to the attention of the Executive Committee so that they may give the Editor instructions accordingly.

JUDGE POWELL: I hope there will be no new Editor, if you want to know my ideas on it.

QUESTION: In order to get the second-class postage rate on the roster, it must be of the same form as the Quarterly?

MR. YANCEY: A list of members cannot be mailed under second class rate unless it is a part of the Journal.

PRESIDENT MAYNE: What is your pleasure with reference to the recommendations of Mr. Yancey?

MR. HOLLANDER: I have a suggestion or a thought, rather. Whoever the Editor may be, if he is fortunate enough to have a number of these old copies, perhaps it might not be a bad idea, as he has an opportunity to browse over them, if he picked out one of

the important subjects which hadn't appeared in the current issues and once in a while reprint one of those. It might serve a very useful purpose. It would give those who were not members in back years a chance to study up on some of these subjects that are so worth while.

PRESIDENT MAYNE: What is your pleasure, gentlemen, with reference to Mr. Yancey's suggestions and recommendations?

MR. KNEPPER: Mr. President, I move that the recommendations of the Editor and the suggestions that he made, and also the suggestions from the members contained in the stenographic record, be referred to the Executive Committee for its attention and action.

MR. HOLLANDER: I second the motion.

PRESIDENT MAYNE: You have heard the motion as stated by Mr. Knepper. Are you ready for the question? Does anyone want to speak on the question? All those in favor, signify by saying "Aye." Contrary. It is so ordered.

JUDGE POWELL: Mr. President, if it is not out of order—and I hope it is not—may we express to Mr. Yancey our very deep appreciation of the work he has done as Editor of the Journal? I don't think the By-Laws provide for a resolution of that kind as regards papers but I wish to thank him for the very excellent work he has done in connection with that job. It has been a marvelous piece of work.

PRESIDENT MAYNE: I believe all the members of the Association will heartily agree with Judge Powell. I can say in the past year Mr. Yancey has been a tireless worker on this matter of the Editorship of the Journal and also the preparation of this roster. I don't know how he keeps up his correspondence but I don't believe there is a day passes that in the afternoon I did not see a letter from George Yancey from Birmingham, Alabama, on top of my desk when I came back from lunch. How he keeps it up, I don't know, but that is his record. So, on behalf of the Association, Mr. Yancey, we wish to thank you for the great work you have done on behalf of the Journal during the past year. (Applause.)

Now, gentlemen, in the July issue of the Journal, the various reports of the committees were published. The report of the General Legislative Committee was published, appearing on page 6 of the Journal; the report

of the Committee on Unauthorized Insurers; the report of the Fidelity and Surety Committee; the report of the Committee on Workmen's Compensation and Unemployment Insurance; the report of the Casualty Committee; and the report of the Health and Accident Committee has been prepared and sent to me here by Mr. Hobson, a member of that Committee. Mr. Hobson has that report and I would like to have him read it, if he will.

MR. HOBSON: Mr. President, it is getting mighty late now and, if it meets with the pleasure of the meeting, I move that the report be filed and printed in the Journal and that we dispense with the reading of it at this time.

JUDGE POWELL: I second the motion.

PRESIDENT MAYNE: It has been moved and seconded that the report of the Committee on Health and Accident Insurance be received, filed and published in the next issue of the Journal, which will be the October issue. Are you ready for the question? All those in favor, signify by saying "Aye." Contrary. It is so ordered.

(For the report of the Health and Accident Committee see page 106.)

Now, according to our program, there is to be an open discussion of the Committee reports. It is five minutes to five and I would like to receive the sentiment of the members as to whether you desire to discuss the various reports that have been published in the July issue or whether we shall proceed to adjournment at this time.

MR. QUAY: Mr. President, I don't think anyone wants to remain to discuss the contents of any of the reports. In view of the requirements of the By-Laws that committees merely make recommendations to the Executive Committee or carry out definite instructions from the Executive Committee and the fact that the report of the general Legislative Committee and the report of the Committee on Unauthorized Insurers contain definite expressions on controversial subjects, I move that both reports be re-committed to the respective committees to be reconsidered and reports made to the Executive Committee before the next annual meeting.

MR. DRAKE: Mr. Chairman, I don't quite understand the purpose of referring them back to the committees. Couldn't the reports be considered as made to the Executive Committee at this time, so they will have it? I don't just understand why they would

be referred back to the committees. The committee is making its report. It has to report to somebody. If it can't report to the Convention, it ought to report to the Executive Committee. I would make a motion that these reports be considered as reports of the committees to the Executive Committee.

MR. KNEPPER: I second the motion.

MR. P. N. BROWNE: Mr. Chairman, I would like to amend that by adding that those committee reports be considered tomorrow instead of at today's meeting, for the reason that none of us knew those committee reports were coming up and that will give us an opportunity, all of us, of reviewing them and discussing them tomorrow.

MR. QUAY: Mr. President, as the one who offered the original motion, I should like to accept the substitute offered by the last speaker.

MR. DRAKE: I will accept that, too.

PRESIDENT MAYNE: The amendment as offered by Mr. Browne, of Shreveport, is before us. Is there a second to the amendment?

MR. KNEPPER: I second it.

PRESIDENT MAYNE: The motion is that the Committee reports that I have referred to be taken up probably tomorrow, or at our Friday session. Will that be satisfactory?

MR. BROWNE: Either one.

PRESIDENT MAYNE: If we move rapidly with our program, we may have time tomorrow. If not, it will be Friday.

Are you ready for Mr. Browne's motion? All those in favor, signify by saying "Aye." Contrary. It is so ordered.

The last order of business for the day is the duty of the President to appoint the Nominating Committee, and I have the honor to appoint on the Committee, Marion N. Chrestman of Dallas, Texas, Oscar J. Brown of Syracuse, N. Y., P. E. Reeder of Kansas City, Mo., Robert M. Noll of Marietta, Ohio, and Lowell White of Denver, Colorado. That committee should meet as soon as possible for their deliberations.

MR. HAYMOND: Mr. President, the Men's Entertainment Committee desires me to make one or two announcements that may be of interest to the members.

Tonight after the dinner, there will be the usual dance in the hotel ball room, probably from about 10:30 on. Between the hours of 7:00 and 8:00 o'clock, there will be a Cocktail Party in the South Dining Room of the

hotel. We considered making that 6:00 o'clock but the opinion of most of the Committee is that it should be from 7:00 to 8:00. But come around any time between 6:00 and 8:00.

MR. RAY MARTIN: Mr. President, as it stands now, is there any set time within which the Nominating Committee makes its report?

PRESIDENT MAYNE: No, there is no time set, Mr. Martin.

MR. MARTIN: I would like to make the suggestion that at the conclusion of their labors, the names be posted so that between now and the time the matter comes up, we may know whom they have suggested. I don't know whether that has ever been done before or not.

PRESIDENT MAYNE: You mean in advance of their report?

MR. MARTIN: Yes. As I understand it, the Nominating Committee reports to the Convention. I have known of it being done in the last few minutes before the closing of the Convention, and it seems to me it would give us a little more information if by a time fixed—the election is the last day, if I am not mistaken.

PRESIDENT MAYNE: It will be Friday of this week.

MR. KNIGHT: Mr. Chairman, I rise to a point of order. The order of business, unless that be changed by unanimous vote, which is within the power of the Executive Committee, has been printed and fixes it as Item 4 on the morning of Friday, August 30—the Report of the Nominating Committee and Election of Officers. So that is a fixed order of business for that time and has been so published.

MR. MARTIN: I see nothing inconsistent with having the names made available before the matter comes up in the order of business to which attention has been called.

MR. KNEPPER: Mr. President, I am not a member of the Nominating Committee, but I was a member three years ago and, as I recall it, we had to be in almost continuous session when out of the meeting room and away from the entertainment, from the time of our appointment, and I think they had to send for us to make our report. Now, that came about in this manner. It was the object of that committee and, as I have understood, it has been the object of every Nominating Committee, to receive the suggestions of every member of the Association in rela-

tion to any person they might desire to have nominated for an office, and it is the duty of that committee to consider all these suggestions and thus make it a sort of a melting pot in order to bring in their report, and I conceive if the members here act with the same enthusiasm that they did three years ago, this committee is liable to have so little time available outside of its deliberations that it might be very inconvenient to do much posting before Friday morning.

MR. MARTIN: Mr. Chairman, of course I am making no point on this beyond bringing it to the attention of the meeting. I just thought if those that receive favorable consideration and are decided on by the Nominating Committee could be posted as they went along, it would be of some help. It would be only a tentative list, of course.

PRESIDENT MAYNE: Well, Mr. Martin, you probably know, under the By-Laws, that even though the Nominating Committee makes certain recommendations to the membership, the members are privileged to make such nominations from the floor as they desire, and the recommendations of the Nominating Committee are not binding upon the members of the Association.

MR. MARTIN: Yes, Mr. President, I realize that.

PRESIDENT MAYNE: If there is no objection, the meeting will be adjourned.

Adjourned at 5:07 P. M.

Thursday Morning

The third session, Thursday morning, was called to order at 10:25 o'clock, President Walter R. Mayne presiding.

PRESIDENT MAYNE: We are going to try to finish this program in order that we may enjoy the sunshine and the golf course but, in order to do so, I would appreciate it if all the members will kindly remain during this session. It won't last over an hour and one-half and, in respect to the speakers who have worked on their papers, I feel we ought to give them our close attention. I think we owe it to them.

The first paper on our program this morning is by Mr. Richard B. Montgomery of New Orleans and his subject is, "The Effect of the Presumption Against Suicide Upon Burden of Proof in Life and Accident Cases." Mr. Montgomery. (Applause.)

(Mr. Montgomery then delivered his address. See page 51.)

Mr. Montgomery, on behalf of the Association, we thank you for your address.

Before anyone leaves the room, I would like to have Mr. Roy Dickie make an announcement and we will then proceed with our program.

MR. DICKIE: Just a few things about your golf this afternoon. Some of you weren't here when the announcement was made yesterday. The tournament, so-called, will be played on the No. 3 or Greenbrier Course, which is that course to the left of the Casino as you go down, not the one starting out over the stream. You will go there and there will be an attendant who will take your name. It will be necessary for you to give your age in order to know whether you are in the senior or junior class, that is, 50 or over or under 50; and select a handicap for the Blind Bogey Contest.

When your round is completed, sign and turn in your card to the attendant, who will take your score, and on that card, if you will circle all birdies or eagles, it will help, because there will be some reward for that.

Your greens fee and caddy fee will be paid by the Association. You will have no expense in connection with that matter for today.

PRESIDENT MAYNE: Our next address will be by Mr. Henry Swift Ives of New York City, Special Counsel of the Association of Casualty and Surety Executives. Mr. Ives.

MR. IVES: Mr. President, ladies and gentlemen:

I address you with a good deal of temerity in a general way, because of the fact that I haven't cited a single case in my address and it isn't primarily a legal address. I might explain in that connection, perhaps, that I really am not the type of lawyer that most of you are. I like to call myself a constitutional lawyer. You know a constitutional lawyer is the easiest kind of a lawyer to be. All you have to do is to say, when a matter is presented to you, "Well, that law is unconstitutional." The great trouble with it is, though, that most laws are constitutional; that is one of their fundamental defects, in my opinion. (Laughter.)

I hope that, after I get through with this dissertation, your reaction to it will not be the same as that of an old lady who attended a series of revivals in a small town. This town was more or less isolated and she lived in peace with herself and with the world for a good many years until a revivalist came there and stirred up a lot of excitement. The

old lady had sat during the course of the revival in a front pew of the church alone, but she had not said anything, she never got up with the rest of the folks. When the last day of the revival came, the revivalist asked her if she wouldn't stand up and say something. He said he had seen her there right along, he knew she was deeply interested, and he wished she would stand up and give her impressions of these revival meetings.

She got up and said, "Mr. Minister, before you came here, we in this little village and community didn't know what sin was, and I am so glad now that we do." (Laughter.)

As I say, I hope your reaction to my address will not be like hers.

(Mr. Ives then delivered his prepared address. See page 70.) (Applause.)

PRESIDENT MAYNE: Mr. Ives, on behalf of the Association, we certainly wish to thank you for your very able address.

I believe that the message that Mr. Ives has delivered to us, we can well counsel and take into our own and try to follow some of the ideas that he has advanced.

Our next speaker will be Mr. Willis Smith, of Raleigh, North Carolina, on a subject that I feel we are very interested in as it is a new branch of the law which I must admit I know very little of, and I am most happy to have Mr. Smith here to discuss the Use of the Federal Declaratory Judgment Act to Test the Constitutionality of State Insurance Statutes. Mr. Smith.

MR. SMITH: Mr. President and gentlemen of the Convention: I will take this watch out. I don't know that it will do very much good, since I have a manuscript, but, anyhow, it will be a gesture in the right direction. Then, too, I have in mind what President Mayne said just now to Mr. Dickie when he called on him to make an announcement. He said, "Before the crowd begins to leave." That reminded me of an occasion down in our state. One of the favorite types of entertainment in North Carolina is having and attending barbecues. Well, when the barbecue is almost done, you can smell it and it is very enticing. Upon this occasion, they were having a speaking, down in Eastern North Carolina. It was in the summer time when all the various candidates for the state and county and local offices were on hand to dispense their wares to their constituents, and there happened to be about ten speakers on the program.

After several of them had spoken, finally, about the seventh or eighth man got up to speak and he took considerable time in discussing whatever was of interest to him, and when he got through, he noticed that all the crowd had left save one man, and that is what reminded me of the story when Mr. Mayne said what he did. Anyhow, our friend finished his speech and when he got through, he walked down and said to this man who had stayed until the end, "My friend, I want to thank you and give my appreciation to you for staying through to the last and hearing my speech to the bitter end. I want to thank you very much and tell you how I appreciate your courteous action and your consideration."

Whereupon the gentleman who had remained as the only auditor, said, "Why, my friend, don't thank me. I'm the next speaker on the program." (Laughter.)

Now, gentlemen of the Convention, my subject has been variously described. I sent in one subject, I saw on the advance program some variation, and I get here and find still another slight variation, and I realized that my title was quite like the subject I am going to discuss—in a state of flux and changing very rapidly.

I have prepared my remarks. I have not attempted in this address to cover the subject either exhaustively or to cover specifically the Federal Declaratory Judgment Act, the latter, manifestly, for the reason that there has not yet been a sufficient number of precedents to draw any definite conclusion as to what that statute may do in the life of our jurisprudence. However, I have deemed it necessary, in order that we might understand what was back of this statute and what, indeed, was back of all the statutes, to discuss a little of the need for the declaratory judgment form of action and then to show in brief form just exactly what has taken place in this country, also in England and in Australia.

(Mr. Smith then delivered his prepared address. See page 76.)

PRESIDENT MAYNE: Mr. Smith, in behalf of the Association, we certainly wish to thank you for the fine address. (Applause.)

Again this evening we will have the usual Cocktail Hour between 7:00 and 8:30. It may extend a little longer if the members so desire.

Meeting adjourned.

Friday Morning

The fourth session, Friday morning, was called to order at 10:10 o'clock, President Walter R. Mayne presiding.

PRESIDENT MAYNE: Will the meeting please come to order. I am glad so many have been able to withstand the Cocktail Hour. I understand that Mr. Thomas of Des Moines, Iowa, claims that someone drank his straw hat. If anyone did so, please try to return it in status quo to Mr. Thomas.

Gentlemen, we will proceed with the order of business of the day. It is a pleasure to have Mr. Robert L. Webb of Topeka, Kansas, here, who will read a paper on the subject of "Liability of Insurance Company When It Takes Full Charge of the Investigation and Defense." Mr. Robert L. Webb. (Applause.)

MR. WEBB: Mr. President, guests and members of the Association:

I didn't lose my glasses but I have had an awful time with my throat. I don't know just what the trouble is.

This paper, or whatever you may call it, is really quite academic, and the longer I stay here, the more academic it seems to me, having heard the papers during the past two days.

You will remember that last year Mr. DeJarnette delivered a very fine address on the subject of Determining Casualty Liability in Advance of the Trial of the Main Suit. In arriving at his points, he necessarily covered a great deal of the territory that I have endeavored to cover. In fact, when I finished my document, I firmly concluded that he undoubtedly copied a great deal from this document of mine. Now, it isn't because I think I can improve upon what he said but it is because it seems to me casualty insurance is increasing so greatly, and there is always the question of the company's liability, that I dare approach this subject.

Now, right here, gentlemen, don't be alarmed. I am going to suggest that while I thought I read every case on this subject and, when I finished, I had 30 pages of manuscript which it would take an hour and one-half to read, for your comfort, I began the process of deletion and emasculation of the paper for listening purposes.

(Mr. Webb then delivered his prepared address. See page 83.)

PRESIDENT MAYNE: Mr. Webb, on behalf of the Association, I wish to thank

you for your address. I am sure we all enjoyed hearing you. (Applause.)

The next order of business will be the address of Mr. Robert H. Jackson, Assistant General Counsel of the Bureau of Internal Revenue at Washington, D. C., on "Equity in Tax Administration." It is my pleasure to present Mr. Jackson. (Applause as all stand.)

MR. JACKSON: If the last speaker found it necessary to explain that his paper was academic, what shall you say of one who attempts to talk about the Income Tax in this day and age to lawyers? I know that you not only have no personal problems about the Income Tax but that most of you shy at even handling them for clients. In this day of declining incomes and rising overheads, I have wondered why it was that the bar so generally dodged dealing with problems in which I observe considerable fees being paid. I concluded that most of you felt as I did about it, that, after all, tax administration wasn't a matter which yielded to reason and that there was very little use of devoting one's self to problems which didn't call for the application of legal talent. I am convinced that a great part of the bar has not only abandoned a very excellent source of income but has made a great mistake in failing to consider the tax aspects of its clients' problems.

Wondering why it was that we couldn't make tax law as reasonable as other departments of the law seem to be, I gave the subject some study and this paper is an effort to answer that question, why tax law is unreasonable.

(Mr. Jackson then delivered his prepared address. See page 94.)

PRESIDENT MAYNE: Mr. Jackson, in behalf of the Association, I assure you we appreciate very much your fine address that you have so graciously delivered to us today. (Applause.)

The next order of business will be the question of approving the various reports that have heretofore been submitted and which have appeared in the July issue of the Journal. The first report that we desire to have the action of the Association on is the report of the Legislative Committee.

MR. DRAKE: Mr. President, at a meeting of the Committee last evening, the tentative report as published in the Journal was discussed and reviewed and some changes were made, largely deletions of a few state-

ments, and so I now will present this report, as modified, and move that it be adopted.

MR. A. B. KELLY: I second the motion.

MR. DRAKE: This is the only copy I have of this and I will leave it with the Chair.

PRESIDENT MAYNE: Will you add this to your motion, Mr. Drake, that a copy of the report, as amended, appear in the October issue of the Journal?

MR. DRAKE: Well, I assumed that was so. It will be printed in the amended form.

PRESIDENT MAYNE: It has been moved and seconded that the report of the General Legislative Committee, as amended by action of the Committee last evening, be approved. Are you ready for the question? All those in favor, signify by saying "Aye." Contrary. It is so ordered.

(The revised report of Legislative Committee will be found on page 104.)

The next report for action of the Convention is the report appearing in the issue of the Journal of the committee on Unauthorized Insurers. What is your pleasure with reference to the report of this committee?

MR. DRAKE: Mr. Chairman, we discussed that, the Committee discussed that also last night very carefully and there were no changes made. I would move that that be adopted.

MR. RUARK: I second the motion.

PRESIDENT MAYNE: It has been moved and seconded that the report of the Committee on Unauthorized Insurers be approved. Are you ready for the question? All those in favor, signify by saying "Aye." Contrary, "No." It is carried and so ordered. (Report will be found in July issue of Journal.)

I would like to have the Association go on record by having a resolution authorizing the Executive Committee to continue the various Legislative Committees of each state. This is a most important work and I believe the Association should go on record authorizing the Executive Committee, by all means, to continue the separate Legislative Committees in each state and, if someone will so move, I will put the question.

MR. KNEPPER: Mr. President, in this room in 1932, this Association authorized the creation of a General Legislative Committee and of Legislative Committees in each of the several states. In Chicago in 1933, the Executive Committee reported to the Associa-

tion, and that report was approved, that the legislative policy of 1932 be continued. The Executive Committee in 1934 followed the same procedure.

Some question is raised as to the full authority of the Legislative Committee, which has worked so harmoniously with the various branches of the industry and I think has done such magnificent work, as is shown by the results in the report. It would seem beyond any question that this is one of the really valuable activities of this organization, and therefore I move that the procedure followed in 1932 and in 1933 and in 1934 and thus far in the year 1935, be continued through the Legislative Committees during the next year.

MR. W. O. REEDER: I second the motion.

PRESIDENT MAYNE: You have heard the motion of Mr. Knepper. Are you ready for the question? All those in favor, signify by saying "Aye." Contrary. It is so ordered.

The next matter will be the report of the Fidelity and Surety Committee, which has heretofore been published in the Journal. What is your pleasure with reference to that Committee report? Do I hear a motion for its adoption?

MR. DRAKE: I will move that it be adopted.

PRESIDENT MAYNE: Is there a second to Mr. Drake's motion?

MR. KNEPPER: I'll second it.

PRESIDENT MAYNE: It has been moved and seconded that the report of the Fidelity and Surety Committee be approved. Are you ready for the question? All those in favor, signify by saying "Aye." Contrary. It is so ordered.

(Report will found in July issue of Journal.)

The next will be the action of the Association on the report of the Committee on Workmen's Compensation and Unemployment Insurance. Robert L. Webb is Chairman of that Committee and the other members are H. L. Smith, Charles M. Howell, Arthur L. Aiken and Robert D. Dalzell. What is your pleasure with reference to that report?

JUDGE POWELL: I move it be adopted.

PRESIDENT MAYNE: Is there a second to the motion?

MR. DRAKE: I second it.

PRESIDENT MAYNE: It has been moved and seconded that the report of the Commit-

tee on Workmen's Compensation and Unemployment Insurance be approved. Are you ready for the question? All those in favor, signify by saying "Aye." Contrary, "No." It is so ordered. (Report will be found in July issue of Journal.)

The next action will be on the report of the Casualty Committee, of which Mr. Garner Denmead is Chairman.

JUDGE POWELL: I move the report be adopted.

MR. DENMEAD: I second the motion.

PRESIDENT MAYNE: It has been moved and seconded that the report of the Casualty Committee be approved. Are you ready for the question? All those in favor, signify by saying "Aye." Contrary. It is so ordered.

MR. ELY: Mr. President, may I make a motion that all committee reports be approved?

JUDGE POWELL: I second the motion. (Report approved.)

PRESIDENT MAYNE: There is only one more, Mr. Ely. I wish you had thought of that five minutes ago.

MR. ELY: I did, but I didn't want to interrupt you.

PRESIDENT MAYNE: There is one report, gentlemen, that was presented here at the meeting and that is the report of the Committee on Health and Accident Insurance. This report has not been published. The committee was Sam H. Mann, Jr., James E. Coleman, Robert P. Hobson, Ralph F. Potter, Maurice M. Winger. If it is agreeable to the members, it will appear in the October issue of the Journal and will be considered as approved, if there is no objection.

MR. HOLLANDER: I so move. (Report will be found on page 106.)

PRESIDENT MAYNE: We have now an opportunity for any member of the Association to address us on any subject they believe will benefit our Association. We want suggestions, we want your advice, and if any of you desire to offer suggestions, we will have a few minutes for this purpose. Our meeting is now open for that purpose.

JUDGE POWELL: I move discussions be limited to five minutes.

PRESIDENT MAYNE: It has been moved that the discussions on these subjects be limited to five minutes and, if there is no objection, that will be the order.

MR. W. P. McDONALD: I wish to present a resolution. Before reading it, I wish to make this statement in reference to it.

The Motor Carrier Act of 1935 was signed by the President on the 8th day of this month. The regulatory body will be the Interstate Commerce Commission. I am advised that the Interstate Commerce Commission will set up a bureau to administer it which will, in turn, set out certain rules and regulations. Section 215 of the Act is entitled, "Security for the Protection of the Public," and under that heading the rules and regulations provide for the filing of insurance policies under the rules of the Commission as well as rules and regulations for self-insurers. Those of us who have had any experience with the administrative interpretations of various governmental bodies will recognize that through the coming year we will see many of those rules that will directly affect insurance carriers and self-insurers. For that reason, I believe a special committee to study that Act and report back is in order, and I therefore offer the following resolution for your consideration. This resolution, I will say, has been drawn as I interpret Section 12 of our By-Laws:

Be It Resolved, That the President of the Association, if he be authorized by the Executive Committee, appoint a special committee of five members to be known as the "Motor Carrier Committee," to study the provisions of the Motor Carrier Act of 1935 that affect insurance, this Committee to report back to the next Convention of this Association.

I move the adoption of this resolution.

JUDGE POWELL: I second the motion.

PRESIDENT MAYNE: Has everyone heard the motion of Mr. McDonald? Are you ready for the question? All those in favor, signify by saying "Aye." Contrary. It is so ordered.

Mr. McDonald, will you kindly deposit the resolution at the desk?

MR. WEICHEL: Mr. President, while we are in session, I would like to call attention especially of those members of the Legislative Committee and the individual members in the various states, to a provision that has been enacted some two or three years ago in Illinois which I think especially affects surety companies. Under the bonds that are written by surety companies, where the company is liable for labor and material furnished under a contract, in most states it is utterly impossible, until the period of limitation, in some instances 5, and as much as 10 years, has expired—it is utterly impossible in those cases to determine what exposure the com-

panies have. On government contracts, the time is limited by the Hurd Act, which you are all familiar with, but in most states there is no limitation.

I have in mind a case in Missouri, by the way, where the company was sued nine years and 11 months after the completion of the contract.

When the question came up in Illinois of amending the Act relating to bonds for public work, we succeeded in having the Hurd Act very closely followed, with the result that there is a limitation now of six months within which action can be brought against the surety, after which the action is barred.

I think it is highly important that in the question of the writing of bonds for state and municipal work—most states have provisions for such bonds—attention should be given and pressure should be brought to bear and there should be called to the attention of the legislature the necessity, the fairness and the justice of some limitation in those acts. While I have no resolution to offer and no motion to make, I call attention to the necessity of it and ask that it be pointed out to the various legislative committees in the states to have some limitation, so that by this great undertaking which the surety companies assume all over the country for labor and material, their liability can be defined and that there may be a limitation within which they must consider themselves exposed, for cogent reasons, as we all know. It is hard to establish proof later on. And there is a question of reserves, a question of the contract of continuing exposure, when you can return collateral that has been taken, and for many other reasons. I think that is a very important question.

Fortunately, as I say, in Illinois we succeeded in having a limitation of six months within which suit could be brought against a surety. I think not only that but it is practically a necessity, as the surety men will point out. I call that to the attention of the men in the various states, to bring it to the attention of their legislatures so that proper action can be taken.

PRESIDENT MAYNE: Thank you, Mr. Weichelt. I believe your suggestion is very timely and I am sure that we will take it back home with us and try to work out the matter that you have mentioned.

Are there any further comments? This is an open meeting and we would like to hear from anyone who has any message to deliver

or inform us how we can improve our Association.

MR. NORMANN (New Orleans): Mr. Chairman, as I understood your opening remarks, you want to know if we have any advice to give you. I am probably one of the oldest members of this Association and I would like to tender some advice but, before I do that, I would like for you to tell me now, because I want the record to show to prevent in the future being met with a statement that what has taken place has been without objection and by precedent. How many members of the Executive Committee, that is, the quasi-officers of this Association, were put on the Nominating Committee?

PRESIDENT MAYNE: There were three members of the Executive Committee placed on the Nominating Committee.

MR. NORMANN: Well, here is the objection that I have and the advice that I have to offer you in response to your query. I believe it is decidedly wrong and I believe from the rumblings that I have heard among the members of this Committee, that in the future, when appointing a Nominating Committee, the members of that committee should be non-officers of this Association. I come from the State of Louisiana and the first thing you might find out, as my friend, Judge Powell, knows, is that we may have a Nominating Committee comprised entirely of the officers of the Association, who may nominate themselves again, and I believe that we will serve the purposes of this Association to better advantage if in the future all the members of the Nominating Committee be non-officers of this Association. I offer you that advice for this reason. A number of the gentlemen here, in their conversations, seem to feel that that is a bad precedent and, in order in the future that we may not be met with the statement that what has been done has been established by precedent, I believe it would be a wise policy for this Association to have non-officers sit on the Nominating Committee. That is the advice that I wish to offer. (Applause.)

I have just been requested to put that in the nature of a resolution, which I would like to do if the Chair will permit it and entertain it.

JUDGE POWELL: Mr. Chairman, of course the obvious answer is that every man is eligible to office in this Association except the members of the Executive Committee who

still hold over and cannot be candidates for any office. They are the ones that know the membership best; they can't be candidates because their terms haven't expired and, therefore, they are the most interested persons in the Association.

MR. NORMANN: In answer to Judge Powell, Mr. President, I will say this, that the membership of this Association, as I recall it, for many, many years stood at about 35. Then Mr. Jones, who died just a few years ago, became President of this Association and he embarked upon an impartial administration of its affairs and, while what Judge Powell says is true and while I know that to be true, nevertheless, as I understand it, the President is likewise ex-officio a member of the Nominating Committee.

PRESIDENT MAYNE: No, the President is not a member of the Nominating Committee.

MR. NORMANN: Well, he was at that time, and he can advise with the Nominating Committee and the Nominating Committee can get all the advice that they need by inquiring among the members without having the members of the Executive Committee, that is, the gentlemen who have officered this Association, to comprise even the majority of the Nominating Committee. I think that is decidedly wrong. I think we should have non-officers on our Nominating Committee, and I believe it would be wise for this Association to adopt a resolution for its future conduct, that that would be the rule that will be invoked in our future appointments of Nominating Committees.

PRESIDENT MAYNE: Mr. Normann, in answer to your advice, I assure you that it will be seriously considered. It will be passed on to my successor, whoever that may be. I believe that you will find that this Nominating Committee has been most diligent, most thorough and most conscientious in their work. Whatever they decide upon, I feel confident that it will have the hearty approval of the membership of this Association. Now, if you have a resolution that you want to offer making it a rule that members of the Executive Committee should not be on the Nominating Committee, you are privileged to present such a resolution, but I believe Judge Powell is correct that three members of the Executive Committee, who are not candidates for office, who know the situation with reference to the membership by the confidence that the members have placed in them by electing them to

those offices, it seems to me that they are qualified and better suited to handle the question of the proper nominations for the officers of our Association.

If you desire to present a resolution, it will be presented to the membership.

MR. NORMANN: Mr. President, I would like to offer a resolution that in the future the Nominating Committee consist of non-officers of this Association.

PRESIDENT MAYNE: Is there a second to Mr. Normann's resolution?

MR. KNIGHT: Mr. President, I arise to a point of order, which will take precedence, I take it, to any person on the floor.

PRESIDENT MAYNE: That is right.

MR. KNIGHT: The resolution is out of order because Article VIII, Section 1, of our By-Laws provides that at the first session of each annual meeting of the Association, the President shall appoint a Nominating Committee of five members, which committee shall make its report, etc. That vests in the President of this Association then presiding the power to appoint that Committee and select them from the body of the Association, the Executive Committee, or in any other manner, just so long as they may be members of this Association, and the President cannot be divested of that discretion without an amendment to these By-Laws changing that provision of Article VIII; and the only way the By-Laws may be amended as now written is by 30 days notice in the Journal or by mail or otherwise. There is not even a provision in these By-Laws that it could be done by unanimous consent. Therefore, I say that the resolution proposed to be offered, or offered, by the gentleman from Louisiana is out of order.

MR. WEICHELT: Supplementing what has been said on the resolution, and for the benefit of members who may be attending their first meeting, there is a way, of course, in all organizations, and especially in this one, whereby anyone may be nominated for any office, and that is through nominations from the floor. There isn't any organization that doesn't have disputes, just like a fight among cats. After the thing is all over, there are more cats (laughter), and it gives life to it. I don't think at this time there is any criticism of the administration and I supplement what has been said, that if the resolution is to be offered, it be done in accordance with the By-Laws.

PRESIDENT MAYNE: The Chair will

sustain the point of order raised by Mr. Knight.

MR. HOBSON: Mr. President, I would like to offer, as an amendment to Mr. Normann's resolution.

PRESIDENT MAYNE: The resolution has been declared out of order.

MR. HOBSON: Then, sir, I will offer a resolution of my own and that resolution is that it is the sense of this body that the President, in appointing a Nominating Committee, should not include upon that Committee any officer or member of the Executive Committee. And if the resolution should receive a second, I would like to speak in favor of it.

MR. WEICHELT: I rise to the same point of order that has been stated by Mr. Knight.

PRESIDENT MAYNE: The Chairman, Mr. Hobson, considers this is the same resolution only worded differently, and therefore I will declare the resolution out of order.

MR. HOBSON: Mr. President, I desire to appeal from the ruling of the Chair that the resolution offered by me is out of order. I appeal to the floor of the Convention.

MR. QUAY: I move the previous question, on the appeal from the ruling of the Chair, so we will have an immediate vote on it.

. . . The motion was seconded . . .

PRESIDENT MAYNE: You have heard the motion. All those in favor, signify by saying "Aye." Contrary.

QUESTION. In voting in favor, are we sustaining the Chair or not?

PRESIDENT MAYNE: Sustaining the Chair, I take it. Just a minute, gentlemen. Let's have order, please. The motion was by Mr. Hobson; he appealed from the ruling of the Chair. Shall the Chair be sustained? I want the action of this body on that question.

MR. KNEPPER: Mr. President, I am afraid that there is just a matter of procedure that is being overlooked. As I understood it, someone made a motion raising the previous question. That, of course, would take precedence. I thought that the previous question motion was the one that you were putting and I think most of the members who voted thought that. "Are you ready for the question?"—and the vote on that would simply carry it. Now, if that motion is withdrawn, then you are on the question of the appeal.

MR. BLAIR: Mr. President, it occurs to me that after the motion was made by Mr.—

I have forgotten the gentleman's name over here—moving the previous question, the question then occurs on the question of whether this body will now have the previous question submitted to the body, which is the resolution. That is for the purpose of stopping any further discussion or debate upon the main question, which is the resolution of Mr. Hobson, so that that matter must be first determined by this body, whether or not they desire to cut off debate on that question. If they do, then vote for the amendment that the gentleman over here is submitting, the previous question. If that carries, then the question occurs on the resolution. If it does not, then debate is able to be continued.

PRESIDENT MAYNE: We will take up Mr. Quay's motion, that is, the reconsideration of the previous question.

MR. KNIGHT: What was the previous question?

PRESIDENT MAYNE: Will you please state your motion again.

MR. QUAY: The motion is for the previous question, in order that we may proceed to a vote without further discussion, because I think that further discussion would be simply sounding off. Everyone knows what he thinks on this already. The question submitted now is, shall we have the previous question? A vote in the affirmative will mean that we will then vote immediately, without discussion, on the question whether we shall sustain the Chair on the point of order.

JUDGE POWELL: I am arising to a point of order.

MR. KNIGHT: I am arising to a point of order. I am asking now what is the previous question which Mr. Quay moves. I assume—and if I am wrong, please correct me—I assume that the previous question is the resolution of the gentleman from New Orleans. Is that right?

PRESIDENT MAYNE: No.

MR. KNIGHT: What is the previous question?

PRESIDENT MAYNE: It is Mr. Hobson's appeal from the ruling of the Chair.

MR. KNIGHT: Then there can be no question on that. When he appeals from the ruling of the Chair, there is only one thing for the Chair to do and that, the Chair started to do. There can be no previous question moved then on that because that has been ruled out by the Chair, and then the appeal comes and the Chair started to do the proper thing, that

is, "All in favor of sustaining the Chair, vote 'Aye.'"

JUDGE POWELL: That is the point of order I was making.

PRESIDENT MAYNE: I consider Mr. Quay's motion out of order. Now, the question is whether the body is to sustain the Chair in overruling Mr. Hobson's resolution. Is the body ready to act on that matter? All those in favor of sustaining the Chair, please signify by saying "Aye." Contrary, "No." All those in favor of sustaining the Chair, please rise. All those in favor of not sustaining the Chair, please rise. The "Ayes" have it.

Is Mr. Chrestman in the house? Mr. Chrestman, we will have the report of the Nominating Committee.

Just a minute, gentlemen. Let's have order. Before we receive the report from Mr. Chrestman, as Chairman of the Nominating Committee, Mr. Millener would like to make a statement.

SECRETARY MILLENER: Gentlemen: On the first day of our Convention, your President appointed a Nominating Committee whose function it is to make recommendations to this body of nominees for offices for the ensuing year. This Committee in a short time will render to you a report of its deliberations. I do not know who the nominees will be, but I desire at this time to announce to my many good friends in this organization that I am not a candidate for re-election to the office of Secretary and Treasurer, nor to any other office.

I have served this Association for 15 years as its Secretary-Treasurer; I have tried to faithfully serve you during that period; I have tried to live up to the trust and confidence you have reposed in me. I indulge the hope that you will elect some other persons to the offices of Secretary and Treasurer. If I may put this Association in the category of an individual, I desire to say I was present in Atlantic City, New Jersey, in September, 1920, when this child was born; I have had a part in nurturing it when it was struggling in swaddling clothes. It has been a source of great pride to me to see it grow to sturdy manhood. I shall always cherish with fond memories the fact that it was my privilege to watch over its healthy growth from infancy to the present time.

In conclusion, I desire to thank my many friends for the hearty co-operation in assist-

ing me in the work I have been so active in for a number of years.

JUDGE POWELL: Mr. President, the remarks that I am about to make are wholly out of order but I am asking the indulgence of this Association and its Chairman for an extraordinary privilege.

It would be most insincere on the part of me or any other man in this body to deny cognizance of the fact that throughout this Association there has been a controversy brewing. There has been a controversy that involved the honor of no man, but there has been one, nevertheless, and I want to ask the Chair to allow this Association to rise to its feet in appreciation of the magnanimity of Mr. Millener in the position he has just taken. All he has said as to his faithful service to this Association is included in the rising vote I am asking you to allow this Association to take. I have been at every meeting of this Association since its inception. I have learned to associate with John Millener in the friendship of himself and his lovely wife. I have frequently disagreed with him and we have fought out our disagreements like men and still remain friends, and I want this Association, Mr. Chairman, to rise and let John Millener know that we still appreciate him. (Applause as all stand.)

PRESIDENT MAYNE: We will now hear from Mr. Chrestman, the Chairman of the Nominating Committee.

MR. CHRESTMAN: Mr. President, I think I should say this on behalf of my comrades on this Committee. You know we have become veterans when we have passed through the Nominating Committee once. In the first place, we keep long hours on this Committee. We set the principle of not holding later than 2:00 A.M., if possible. The labor is rather arduous because many members and many committees actually desire to talk to us. Of course, the labors amount to nothing to the Chairman because he is compensated in the honor of being Chairman, but the individual members of this Committee have real work to do. The Chairman has finally gotten together two cigars out of this—no boxes wrapped in paper. But we have come now to the firm conviction that we ought to present a report, after much discussion and much advice, and, while Judge Powell stated it correctly, it was apparent to everybody that there was a row brewing, and men came, some came with specific, definite advices, but under

the undercurrent, the compensation to this Committee was that out of every conversation and every man who came, there was that sincerity of purpose to look down way ahead for the best interest of this Association, and out of those conferences the Committee received much benefit and we believe that in giving you as nearly as possible a clean and new slate, a new kind of a New Deal, that we have done something that you may approve, at least in part.

To the Honorable Walter R. Mayne, President of the International Association of Insurance Counsel:

Your Committee, appointed by the President in accordance with the Constitution and By-Laws of this Association, hereby submits the following list of nominees for the respective offices to be filled at this session for the term beginning at the close of the 1935 Annual Meeting of this Association, to-wit:

For President, J. Roy Dickie, of Pittsburgh, Pa.

For Vice President, George L. Naught, of New York City.

For Vice President, Gerald P. Hayes, of Milwaukee, Wis.

For Vice President, Joseph B. Murphy, Rochester, N. Y.

It will be observed that geography is being recognized and read into this. Likewise, that one office is made into two. Some of these men have never heard of this report and have no knowledge of the fact that they are being named. I like that, because that is the way it came to me, and if they asked me, I wouldn't have served. We didn't take any chances on them.

For Treasurer, Harvey E. White, Norfolk, Va.

For Secretary, Richard B. Montgomery, Jr., New Orleans.

For members of the Executive Committee:

Russell M. Knepper, Columbus, Ohio.

Milo H. Crawford, Detroit, Michigan.

Miller Manier, Nashville, Tenn.

This is signed by the Chairman, Reeder, Brown, Noll, and we haven't been able to find Lowell White or he would sign it. I thank you.

PRESIDENT MAYNE: Mr. Chairman and members of the Nominating Committee: On behalf of the Association, I thank you for the work you have performed.

What is your pleasure with reference to the report of the Nominating Committee?

MR. WEICHEL: I move the report be adopted and the Secretary be instructed to cast the unanimous ballot of the Association for the election of the officers and members of the Executive Committee.

MR. P. N. BROWNE: I second the motion.

PRESIDENT MAYNE: It has been moved and seconded that the report of the Nominating Committee be adopted as read and that the Secretary cast the ballot unanimously for those that have been named. Are you ready for the question? All those in favor, signify by saying "Aye." Contrary. It is so ordered.

Is Mr. Dickie present? Mr. McKay, will you bring Mr. Dickie up. (Applause as all stand).

PRESIDENT-ELECT DICKIE: Ladies and gentlemen: In view of the discussion that has been had here this morning, I feel that I should say just a word or two. In the first place, I want to say to you that it was, perhaps I can't honestly say a complete surprise, because Pete Reeder was kidding me a little yesterday out on the golf course about this possible situation, but I took it as kidding at the time, but it was a complete surprise when Judge Chrestman told me this morning that the Committee had determined upon submitting my name to you for this high office.

I don't recall at this time just how many years I have been a member of the Association. I was a member a good many years before I first came to a meeting, the one which was held here in 1932. I have enjoyed each and every one of the meetings that I have attended. I had absolutely no intimation last year that my name was to be presented to the Association for election as Vice President. I have served during the past year with your officers and Executive Committee with a great deal of pleasure, but I still come to this office, gentlemen, with a very profound ignorance of its duties but with a determination to learn them, I may say, and to do the very best that is possible under the circumstances; and one of those circumstances, gentlemen, is the fact that John Millener, who has known the work of this Association so intimately and for so many years, is now passing out of office. You are all aware of the fact that in such organizations as this, executive officers very com-

monly lean upon the Secretary, who at all times has his fingers right on every detail of the work of the Association. It would seem, from the action of the Association, that we are not to have that assistance and guidance. I am sure that Mr. Montgomery will efficiently discharge the duties of his office, but he also comes new to them, and these problems therefore will be new both to Mr. Montgomery and to myself. I am sure I can speak for him when I say that we shall both do our best, along with these other newly-elected Vice-Presidents and members of the Executive Committee, but we will have to ask your indulgence because we will have to feel our way, and I am sure that John will be generous in his counsel and advice, even though he is not an officer of the Association at the time.

I can only say to you, gentlemen, that we are all members of an Association which has infinite powers for good. We have powers to do each other good here and we certainly have the opportunity to serve those who are our clients and who provide for us, if we look at it in a very selfish way, a very substantial portion of our livelihood, at least. We owe a great deal to them.

Our aim will be, I assure you, as it has been in the past, that we may have not only a delightful fellowship here annually but that we may serve each other and our clients, these insurance companies. I can only assure you that I appreciate this very high honor. Mr. Mayne just said to me—I am sure you couldn't hear him at the moment, but he just said to me that it is the highest honor that ever came to him and he was sure the highest that could come to me, and I so regard it and I shall do my very best.

And I want to assure you that my election here was not the result of any machinations on my part. I feel rather drafted; although that sounds perhaps egotistical, I don't mean it that way. I am not so sure at all. I am conscious of the high honor but I am even yet not sure whether or not I can meet the responsibilities that you have placed upon me. I assure you, however, that I shall do my best.

I thank you. (Applause)

The next order of business I am advised is the report of the Golf Committee, of which I have been Chairman. By the way, I don't know, I have tried to do whatever I have been asked to do in this Association since I have been on the Executive Committee, but perhaps my only claim to distinction around here has

been the fact that I was last year and this year again the Chairman of the Golf Committee. I don't think I should have known half of you if it hadn't been for that, and you wouldn't have known me, but we have had a delightful tournament.

I am going to ask Mr. Noll to make this report, but it may be of interest to you to know that we had 93 men tee off and finish yesterday in the tournament, which is by all odds the largest number that we have ever had. I was advised by Mr. Martin, who assisted us down there at the Casino, that the last foursome finished in daylight, but they couldn't have played another hole. Ninety-three is a large field.

I will ask Mr. Noll, who was my co-Chairman on this Committee, to make the report of the Golf Committee, assisted by Mr. Blair.

MR. HOLLANDER: Mr. President, just before you go to that report in detail, I want to take exception to the last remark. The last foursome was an eightsome that completed the 18 holes in absolute darkness, as your predecessor will bear testimony to.

PRESIDENT DICKIE: Probably the score indicated it!

MR. HOLLANDER: I am sure that every member of this Association is going to give you his undivided and whole-hearted support. As you know, I have always been willing and helped balance up a foursome whenever I got into one with you, but there is just one more thought and that is this. I also feel that John Millener will help you to the utmost of his capacity.

There is just one thought I want to leave with the Executive Committee. In fairness to yourself, you are going to have, as I have often heard it said, a rough and rugged road to travel, particularly now, because of so many elements and questions that come in, and the thought that I would like to leave as a mere suggestion to the Executive Committee is not to make that functioning body or individual that is going to carry on the details of this office as Secretary, or Executive Secretary, too far away from you. That is one thought.

The second thought is this, that if there is to be such heading of an office of the Executive Secretary, with all due apologies to the ladies,—and God knows we love 'em all and everything else like that,—I would like to see that this Executive Secretary, whoever it may be, be a man of broad understanding and

someone who is familiar with this work rather than go through the experimental stages of trying to break someone in to handle a job of this vast importance and, certainly, of utmost interest to all of us.

MR. CHRESTMAN: Mr. Chairman, I am requested by a lot of married men around here to say we don't cover that entire field by loving all the women.

PRESIDENT DICKIE: You are allowed to particularize.

All right, Mr. Noll.

MR. NOLL: While some of the golfers did not finish in the daylight, there was one golfer, at least, who could not play the 18th hole, and I refer to our newly-elected President, Mr. Roy Dickie. Roy took a nice sweet 6 on the 18th. Otherwise, he would have carried away the prize for men over 50.

Golf seems to be becoming more prominent in this Association as the years go by, but this entry list and the scores being lowered I think will insure its being a permanent feature of our entertainment, especially since someone,—and I want to thank the individual or all the individuals who discovered a room at the end of the corridor,—turn left ten paces, turn left and enjoy the 19th hole. If that little Cocktail Room is continued in the future, I know there will be more entries next year than we had this year.

MEMBER: In view of the particularization, I take it for granted you made the measurements before you went in and not as you came out, sir. (Laughter)

MR. NOLL: It used to be that a man whose hair was greying around the edges could win a golf prize generally in this Association but the younger men have been coming in on us. This year we have a newcomer from Cleveland, Ohio, Mr. M. M. Roberts, who shot the wonderful score, for lawyers, of 74, and he is the winner of the first prize of this tournament and is entitled to have his name engraved on this beautiful cup presented by Best some years ago as the permanent trophy. And, by the way, the trophy looks as though it has had a similar experience to a 6-foot mountaineer trying to sleep in a four foot bed; it has been damaged in transit. It must have come through on a Model T Ford or something. But the Best Company will take it back to the silversmith and have it placed in first-class condition and ship it to Mr. Roberts.

In addition to this, I spent 50 years of my life winning golf cups. I am now trying to repay the compliment by spending the next fifty years of my life giving golf trophies and Mr. Roberts will obtain, in addition to having his name on the large cup, a cup that I have presented this year. Please come forward, Mr. Roberts. (Applause) Mr. Roberts of Cleveland, Ohio.

The second low gross for men under 50 was won by P. H. Eager of Jackson, Mississippi, with a score of 75, and Mr. Eager is entitled to have his name engraved on the very beautiful platter presented by Mr. Lon Hocker of St. Louis, Mo. In order to obtain permanent possession of this plate, it will be necessary for Mr. Eager next year to obtain the low gross score. It must be won twice. Mr. Dickie won it in his 49th year and was ineligible to win it the second time, so that will be a trophy to be played for next year and, if history repeats itself, it may be with us for years to come. Will Mr. Eager please come forward. (Applause) Congratulations, Mr. Eager.

For the second low gross for men under 50, Mr. F. H. Durham of Minneapolis is the winner, with a score of 78, and wins the silver relish dish. Is Mr. Durham in the house? Mr. Durham, you may make a speech if you desire.

MR. DURHAM: No, thank you.

MR. NOLL: I would advise every golfer who has a desire to win a trophy to get on the Golf Committee. The next two prizes were won by members of the Golf Committee. I am very happy to thank the donor of the silver ice bucket. I understand that the Association presented this ice bucket and, with a score of 78, I am permitted to present it to Mrs. Noll. (Laughter) I thank Mr. Dickie for his happy selection of a prize that pleases her.

For the second low gross for men over 50, I have the pleasure of presenting to Mr. Roy Dickie this beautiful bag. I think the design has been approved for bottles.

For the low net, I might explain to the golfers that the handicaps are fixed by the best nine you shoot. The purpose of that is to relieve each individual from the embarrassment of taking too low a handicap. No one, of course, would take too high a one, so your best round fixes your handicap, and the result of that is that there were seven golfers tied with a low net of 68. They are H. R.

DeJarnette, Wayne Ely, Rex H. Fowler, J. Peyton Hobson, J. B. Murphy, G. D. Blount and George L. Naught. Now, since we have only three prizes, we have decided, if it meets with your approval, to place the names of the 7 gentlemen in the ice bucket and have a blind-folded Darkey draw the names out or, if he isn't available, to have someone close his eyes and, since Judge Powell does not play golf and is so imbued with that spirit of Bobby Jones' honesty in golf, I will ask that the names be drawn one at a time. No. 1 will win the first prize. (Judge Powell drew a name) Wayne Ely. Judge Powell suggests that Wayne Ely's name was on all of them.

The second is Peyton Hobson. And the third is Rex Fowler.

Now, Mr. Wayne Ely, through his ability and his luck, is the winner of the silver brushes, the military set, and comb.

Mr. Peyton Hobson wins the golf bag. And Mr. Rex Fowler, the Cocktail Shaker. This prize was donated by Mr. William Bourland of Chicago.

MR. M. H. SCHWARTZ: Mr. President, I ask permission to donate to Wayne Ely a bottle of hair tonic to go with his prize. (Laughter)

MR. NOLL: On the Blind Bogey, some of the golfers who were giving in their handicaps thought that the figure they gave in would be deducted from their score, but the purpose of that handicap was to fix a blind bogey and that blind bogey was determined by a drawing of one of ten numbers from a hat, and the number drawn was 70 and the handicap that you handed in, of course, was operated against that 70. There were four players who had a 70 and each of those players, as I read their names, will please come forward and receive three golf balls. H. J. Drake, William O. Reeder, J. L. Barton, and Peyton Hobson. There are 12 golf balls but on account of there being the ties, they each get 3.

Now, after being in the imported white sand and suffering sevens and eights and nines, the compensation was, of course, that ever working for the birdie, because each player who made a birdie is entitled to one golf ball for each birdie, and there are quite a few and the gentlemen are to be congratulated on those long putts or lucky approaches. Each individual whose name I now read will be entitled to the number of golf balls that I name.

Mr. Mark Townsend, 2 golf balls. Come forward, please, and get them as I call the names.

John G. Sykes—1.
George Yancey—1.
R. M. Noll—1.
Roy Dickie—1.
E. A. Marshall—1.
William O. Reeder—1.
P. H. Eager, Jr.—2.
P. E. Reeder—1.
R. R. Quillian—1.
F. M. Miller—1.
T. E. Lipscomb—1.
N. W. Lamire—1.
J. B. Murphy—1.

MR. MURPHY: I want to tell a story that you are going to hear about in a moment. Mr. Caverly will appear on this list. He called my attention this morning to a fact that I think we lawyers ought to all know. He said that a lawyer whose golf score was over 90 was not giving proper attention to his golf, but a lawyer whose golf score was under 90 was not giving proper attention to his law.

MR. NOLL:

R. N. Caverly—2.
G. L. Reeves—1.
H. R. Goshorn—1.
Wm. D. Howell—1.
M. M. Roberts—2.
H. E. White—1.
C. M. Haley—1.

In years gone by it has been the custom to present, with a view to encouragement, a prize to our World's Worst Golfer. Last year we gave Miller Manier a set of fine golf clubs. He is so hopeless and he has won the prize so often that this year we deemed it proper and expedient to elect him and free him from all competition, so we have accordingly selected him and elected him President Emeritus as the World's Poorest Golfer. (Laughter.)

It has been a pleasure to serve on your Golf Committee. Mr. Dickie has performed all the work but the kindness of the golfers and the ease with which they were handled made it a real pleasure. We were on the No. 1 tee yesterday afternoon for one and one-half hours starting them and never a single complaint did we hear; and to those of you

who have had experience running golf tournaments, you know that is exemplary. So it has been a great pleasure to myself and to Mr. Dickie and the other members of the Golf Committee to furnish you this part of our entertainment. We thank you very much. (Applause)

MR. MAYNE: Mr. President, ladies and gentlemen:

I failed to do what I intend to do now, while I was in office, but I assure you that I want to thank the members of the various committees who have performed so well for me during my administration, and also the officers and members of the Legislative and Membership Committees of the various states. It was a pleasure to work with committees, the members of the committees, and I have also found that anyone that I asked to perform any duty, did it most cheerfully. I wish to thank each and every one of you for helping me during the past year. Thank you very much. (Applause)

PRESIDENT DICKIE: Thank you, Mr. Mayne.

Now, men, we don't want to detain you, but I want to say one other thing in connection with the golf. At the Mid-Winter meeting of the Executive Committee, it was decided that hereafter no prizes would be accepted from any who were not members of the Association. Therefore, these prizes, with the exception of the Best Cup, which, of course, is a permanent cup and was given to us years ago, the Hocker Plate, and the prize donated by Mr. Noll and that donated by Mr. Bourland, were all purchased and presented by the Association itself.

There is another thing that I would like to do just now, and I hope I may have your attention to this for just a moment. I think that these newly-elected officers should be identified and I am going to ask them, if they will, if they are present in the room, when I call their names, to please rise so we may all have them identified as the officers of the Association. It will take less time, perhaps, if they just rise. I am sure we can all turn and see them. Richard B. Montgomery, the new Secretary. (Applause)

Harry E. White, the newly-elected Treasurer. (Applause)

And now the Vice Presidents—George L. Naught. (Applause)

Joseph B. Murphy. (Applause)

Gerald P. Hayes. (Applause)

And now the newly-elected members of the Executive Committee. Milo H. Crawford. (Applause)

Miller Manier, World's Worst Golfer. (Applause)

Russell M. Knepper, whom you already know, I am sure. He has been a Vice President during the past year but is now a member of the Executive Committee. (Applause)

MR. MILLENER: Mr. President and gentlemen: I have a letter that was just handed to me, addressed to this Association—"The International Association of Insurance Counsel, Greenbrier—Dear Mr. Millener:

"We would like to take this opportunity of telling you how pleased we were to have the privilege of entertaining the International Association of Insurance Counsel again at the Greenbrier. We do hope that the accommodations and service have been to your liking and that your meeting has been a successful one.

"We would like to extend a most cordial invitation for you to return to White Sulphur Springs for your 1936 Convention and, in the event we are again favored, you may be assured of our fullest cooperation in making it an outstanding success.

"Thanking you for the consideration shown our resort in the past and with best wishes for success during the coming years, sincerely yours (Signed) George D. O'Brien, Assistant Manager, Greenbrier Hotel."

Now, Mr. President and gentlemen of this Association, three years ago we set a precedent by presenting to the retiring President a gavel, properly inscribed, so that he might have it in the years to come as a memento of the administration during which he presided. You all know that we presented the late Edward Jones a gavel; we presented Mr. Yancey a gavel; and we have during this year had an excellent President. My relations with him for years, and particularly during the last year, have been most cordial. We have had to confer and we have had to write to each other pretty nearly every day, and I would like to at this time, if it meets with your approval, have you give this Executive Committee authority to have purchased and properly inscribed a gavel, and present it to our good and dear friend, our last presiding officer, Walter Mayne. I will so move, Mr. President. (Applause)

PRESIDENT DICKIE: You have heard the motion. Is it seconded?

MR. DRAKE: I second it.

PRESIDENT DICKIE: Are there any remarks? All those in favor, give their consent by saying "Aye." Those opposed, "No." The motion is carried.

MR. G. C. JAMES: Mr. President, I want to make an unofficial announcement for the Press and Publicity Committee. Retiring President Mayne called on every committee but ours to report. Chairman Marshall is not here but I want to make the official announcement in order to allay some uneasiness around here. Our Committee has decided that we will be very happy to sign and send home any letters for any unattended members, any commendatory letters that they may prepare, if they will furnish an air mail stamp, in consideration for an equally commendatory letter regarding the conduct of Mr. Marshall while he was here. (Applause and laughter)

PRESIDENT DICKIE: Thank you very much.

I was just about to say that, so far as I am advised by the experienced executives on my right and my left, the business of this session has been concluded. There will, however, this afternoon be the regular meeting of the Executive Committee in Room 849. Will you all please make note of the number of that room and assemble there promptly at 2:30, in order that we may dispatch such business as will come before that meeting?

MR. NOLL: Mr. President, before we adjourn, it has been my observation that the service that has been given us by the hotel and the golf grounds has been most excellent. I therefore move that we accept with thanks the letter from the hotel and express to them our full approval of the manner in which they have entertained us.

JUDGE POWELL: I second the motion.

PRESIDENT DICKIE: All those in favor, say "Aye." Contrary, "No." It is so ordered.

Is there any other business to come before us before adjournment, gentlemen?

MR. KNEPPER: I move we adjourn.

MR. BECKWITH: I second the motion.

PRESIDENT DICKIE: All in favor, say "Aye." Contrary, "No." The Convention stands adjourned.

... Final adjournment was taken at 12:45 P. M., Friday, August 30, 1935, at White Sulphur Springs, West Virginia ...

Response to Address of Welcome

By JOHN S. LEAHY,
of St. Louis, Missouri.

THE welcome you have extended the members of the International Association of Insurance Counsel will by us be long remembered. A hope of a welcome is man's first and last wish. The joy occasioned by his first arrival at his father's house is a harbinger of a final welcome from the Father of Creation.

The lawyer, absorbed as he is by professional duties, has little opportunity of adjudging reactions incident to the position he takes, either with respect to professional or public matters. It is, therefore, Your Excellency, a matter of intense satisfaction to hear from the lips of the Chief Executive of one of our sovereign states, words of commendation for the tireless, and often unrequited, efforts made by lawyers to improve human conditions, to expand the sphere of justice and to preserve by protecting not alone liberty of speech and of the press, but also liberty of worship and liberty in the use and enjoyment of the fruits of thrift and toil.

Standing in this earthly paradise, listening to your voice, moved by the sentiments you express, we are reminded that this soil upon which we stand was part of the state that gave to the world the immortal Washington and Jefferson, Madison and Monroe; part of the same soil that nurtured the liberty loving soul of the clarion Patrick Henry; part of the same soil from which the Lees and Fitzhughs and Masons sprang; part of the soil which was responsible for the greatest jurist and statesman of this nation, John Marshall, who made solid the foundations of our nation and prevented, as long as we remain sane, the dissolution of the United States of America; part of the same soil from which the first State University grew; all part of glorious Virginia, in whose statute books was first written the statue of religious liberty and tolerance.

We, as lawyers and Americans, viewing the glories of the past and being aware of the physical and material greatness of our nation today, pray that its soul may be ever awake and that by disciplined democracy, by disinterested and intelligent leadership, that the guarantees of liberty contained in our Con-

stitution may be enjoyed by our posterity to the very consummation of time.

All lawyers have a respect for those chosen by the people to administer the affairs of state. That respect increases almost to an affection when the Chief Executive of a state is a lawyer. The history of our country demonstrates that the people are best served; that liberty is most secure; that industry best thrives and that prosperity is most general when the Chief Executives of both state and nation are lawyers. The people who chose you as their Governor are a people of resolution and tenacious to principle, as was best exemplified in the creation of this state. The preservation of such a spirit among all of our people; by intelligently keeping before them the principles upon which our nation was built; by so arranging each state's law as to prevent a foreign corporation securing a license to do business where that corporation or all of its subsidiaries have a capital in excess of that allowed by the state law; by skillfully preserving individual industries; by exacting requirements that will preclude the sale of spurious securities; by maintaining a fair and efficient board to settle disputes between capital and labor; by the minimizing of federal government and the emphasizing of the importance of state government; by arousing interest in people of capacity in the politics of their state, and particularly by having such an interest make itself felt by participation in the selection of office holders; by selecting as judges men who rule not to be popular, but solely to be right; will make of our nation one where unemployment among citizens will be voluntary, where financial depressions will be less severe, and whose population can be twice its present number and whose influence throughout the world will increase with the years until finally the nations on the eastern side of the Atlantic will adopt our national plan and form a United States of Europe.

We, of the International Association of Insurance Counsel, are here assembled, not alone because of the beauties and comforts of White Sulphur, but primarily because of an idealism that lawyers have and will ever entertain with respect to their profession.

Recently, Attorney General Cummings gave a timely interview with respect to certain undesirable classes of lawyers. We believe that he was rather curtailed and too temperate in his viewpoint. It makes but little difference whether the lawyer is in big or little business, whether fame and riches accompany him, or whether he walks the untrod-den ways in poverty, the sole question still remains—is he fit to be a lawyer? His character, his education, his loyalty to the laws of his state and nation are questions of prime consideration. The racketeers, masquerading as lawyers, who helped perpetrate kidnapping, are no worse and no better than the racketeers who have helped blaze a safe path for the investment bankers who were guilty of selling the people thousands of fraudulent bond issues, whose failure caused the workers of this nation to lose billions of dollars. Nor are these two classes of lawyers any worse than the class of skillful, self-satisfied and soul-stifled persons who create for their own private use and benefit a bondholders' protective committee, devised all too frequently for the sole purpose of shaving the shorn lambs. As for the lawyer who suborns perjury, the manufacture of evidence in a criminal or a civil suit, or who aids a person to perpetrate any sort of a fraud, all of these are undesirable and no more fit to be in the profession than was Judas fit to be a disciple of the Master. Nor will any fair man, because of the dereliction of a few, condemn the ancient and noble profession of law, any more than he would condemn the world because of the existence of a number of criminal or unfit people who are in it. There is no profession, no occupation, no business, nor industry that has contributed to mankind one-tenth of the leaders and heroes and world benefactors that has been given by the legal profession.

A calm survey of this troubled earth will lead any philosopher to conclude that we need more lawyers at the head of public affairs. No lawyer would ever attempt what Stalin or Mussolini or Hitler have done. They know too much. Thank God that in this country there are a sufficient number of patriotic and intelligent citizens, both old and young, who know too much to ever permit a dictator to wipe away our present form of government. Thank God our people will not be swayed by passion or prejudice or by position sufficiently to forget that within the heart of the Constitution are priceless legacies that are

bequeathed to them by every martyr who ever gave his life for liberty.

The most interesting history of any nation is the history of that nation's bench and bar. The lawyer, from the earliest civilization down through all the ages, in every country, has been the teacher, the protector, and the leader of every great and successful people. We are thoroughly in accord with every method that will raise the standard of our profession. We believe that preliminary education, as well as a training at an accredited law school, are indispensable, despite the fact that we may pick many instances of successful lawyers who have had neither. We believe, too, that there should be moral, as well as intellectual qualifications for admission to the bar. The paganism that has come into our country by great commercial development and the concentration of great wealth is too often reflected by making men mere numbers and by abolishing private enterprise, and we assert that none of these is the result of the principles promulgated by lawyers.

We are here to discuss problems with respect to that branch of the law that pertains to insurance, which has become one of the most important factors in the commerce and business of our nation. Though our clients are insurance companies and we are insurance lawyers, we assert, as does the Chief Executive of every Insurance Company, that an honest loss should be quickly paid. We are in sympathy with penalizing companies that do not pay honest losses with alacrity, but we, who know the great variety of frauds that are perpetrated on insurance companies and who are aware that these frauds are ultimately paid for by the public, we who have witnessed incompetent, lazy or timid judges permit attorneys for the plaintiff to appeal to the passion and prejudice and weaknesses of juries in suits against insurance companies, do assert that no company should ever be penalized for making a defense on a policy, wherever the facts or the law warrant it. We further assert that it makes little difference whether a company in a particular case is successful in its defense, if it has properly defended that case as a matter of principle, that it will by so doing deter the perpetration of similar frauds, and that the defense of such cases results, not alone in a benefit to the insurance companies, but to society in general.

Anyone who knows the history of insurance is aware of the beneficent work insurance

companies have done and realizes that in the horrible financial cataclysm through which we have passed, that insurance companies have weathered the storm more efficiently than any other class of business. One method to protect both the insurance companies and the public is to make certain that no one is appointed as a Superintendent of Insurance unless he knows the business, and in addition is a man of character, without fear and without reproach. There is no position in the gift of any Governor more important to the whole people than that of Superintendent of Insurance.

We believe there is much work to be done if we would reach a correct moral standard

in changing the law pertaining to suicide as affecting insurance risks. As the law now stands, it puts a premium upon the crime of suicide.

And so, we have assembled in your beautiful state and accept your hospitality, with the assurance that we are here to do a public work in making crime difficult of successful achievement. We are here to find additional ways, if possible, to insure the speedy payment of all proper losses and to make more difficult successful fraud and we are here, we hope, to arouse the executives of all the states to an appreciation that insurance is our nation's most important and best regulated industry.

Looking Forward

ADDRESS OF PRESIDENT WALTER R. MAYNE,
of St. Louis, Missouri.

COMING events cast their shadows before. It is as true today as when spoken by the poet. Shadows of various kinds have fallen athwart our path as insurance counsel. Some affect us alone. Others seem to reach out and touch our fellow Americans in every walk of life. The sinister aspect of some is offset by the promise of others.

Indeed, looking forward into the future and trying to gauge coming events by their shadows, it is not at all a hopeless picture we see. Startling in many respects, yet reassuring on the whole, and rich in possibilities for the insurance field is the picture I see.

It behooves us, indeed, and it is no doubt our joy to study calmly and seriously the influence upon our work of the changes that are taking place, both in the field of insurance law proper and in the nation. If the purposes of our association are to bring us into closer contact, to assist us in becoming more efficient in the practice of insurance law, to aid and protect the interests of insurance generally, to promote the passage of Legislation helpful to the cause of insurance and to oppose the enactment of laws likely to be adverse, all as so well pointed out by President Yancey a year ago, then, indeed, I shall not appeal to you in vain in proposing that we look into the future for the specific purpose of bringing about, if possible, a closer union, a better coordination, between insurance counsel and the field department of our companies.

Surely we may contemplate our work, our special profession as insurance counsel, with the utmost human satisfaction. Where is there a nobler work than that of lightening the swift calamities visited upon the few by sharing it with the many; or where is there a more admirable economy of mankind than by thrift and prudent investment to build up an assurance against the uncertainties of the future? This is the work of insurance and it is our particular privilege to guide, improve and defend it and make it efficient to the last degree.

We are the guardians sent to protect the insurer and the insured lest they strike their foot against a stone. It is for us to be vigilant when those entrusted to our care do nod, to foresee where they are blind, to be brave where they hesitate, to be untiring when they would yield, to be right when they would go wrong. Is there in all the field of human endeavor a calling so fruitful of good, so rich in rewards of mind, so generous in compensation, as ours?

All the more is it incumbent upon us, then, not to allow ourselves to be led astray by passing desires or false theories. It is for us to remember at all times that the highest achievement of insurance in any form is to render the best service to the beneficiary. The success of the insurance company, in the last analysis, is found to be in direct proportion to the service it has rendered.

Therefore, the most commendable insurance counsel is he who best coordinates the insurer and the beneficiary.

Not litigation for its own sake, but adjustment of misunderstandings and controversy, as far as possible, with a view to improving the service rendered to the insured and the beneficiary, should be our constant aim. In litigation, when unavoidable, not conquest of the opponent, but judicial determination of sound principles of insurance law, based on what is right and having in mind what is of benefit to the insured and his dependents, should be our chief concern. There are times, indeed, when the insured and beneficiary would take unfair advantage of the insurer. It is for us to make it plain to the courts and the people that all such cases are an attack not merely upon the defendant insurer, but upon the vast body of the insured and their dependents. We must bring home to the country that the assets of the insurance company are not its own, that they are part and parcel of the assets of the faithful insured and his beneficiary.

Throughout the nation, members of our bar associations, in public and private, have been emphasizing the deplorable fact that the attorney-at-law is looked upon with suspicion, distrust and ill-will by the public at large. The American Bar Association, as you know, has engaged in a definite program of enlightenment of the public mind for the purpose of removing this condition.

Has it not occurred to you that the evil so combated is much over-emphasized; that in fact the members of the bar stand high in the minds of our lay brethren? Is not most of the evil the result merely of the characteristic attitude of the American public to knock freely, praise gushingly and alternate the two at will? Is not the real complaint this, that although a lawyer is recognized as outstanding in the community for learning, acumen and high principles, yet he seems to take forever to get results for his clients?

I mention these things in a rambling way because I am leading up to a similar condition confronting the specialist in insurance law. How often has not the cry gone out from our ranks, that juries and even courts are prejudiced against insurance companies? A year ago President Yancey declared, and truthfully:

"The public, particularly jurors, do not appear to be conscious that insurance com-

panies must of necessity pay their losses from premiums obtained from the public . . . Jury verdicts in many sections have continued to be extremely high. Trial judges do not always reduce verdicts to reasonable amounts on motion. Appellate courts are continuing to affirm judgments largely in excess of a reasonable amount."

Too well do I know the truth of this complaint. But true though it is, I believe it to be as much over-emphasized as is the complaint of the bar against the public.

Indeed, I believe that those of us who look back some twenty years, are forced to confess that the attitude of juries and courts towards the insurance company has shown a decided change for the better. Why, we have even reached the point where we can win verdicts from juries on the defense of misrepresentation in the application for the policy! That a trial court will hesitate to reduce the verdict of the jury as unreasonable or excessive, is, after all, rather to be expected. You have but to place yourselves in the position of a trial judge, to realize the sound reasons for using his veto powers with the utmost prudence.

From the appellate courts the insurance carrier is receiving more and more sympathetic consideration, based upon the true relationship of insurer to insured. Thus, for example, within recent years, the courts of several jurisdictions have applied to the protection of the liability insurer, the principle that the insured must cooperate with the carrier in the lawful defense against the claim for damages made upon him and that if he fails to do so without collusion, the judgment obtained by the claimant is no more available as a demand against the insurer than would be a similar demand by the insured. (*Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 Pac. (2d) 999).

Has not the difficulty been largely one of our own making? Have we not at times rushed to the defense of an impossible position? Are not the courts and jury likely to look with some distrust upon a defendant actually in the case but daring anyone to point it out as being there; or, again, upon a defendant which, having solicited the insured and had him under examination and subsequent observation for an ample period of time to have found out all about him, comes in after his death and charges facts which, though true, are then difficult of proof? Is

it not but natural that our clients will face suspicion of their motives under such circumstances? I am not seeking to justify the suspicion. I am pointing out a normal, human basis for it, in the hope that we may find a human remedy.

Another occasion for the belief so prevalent that our insurance clients are treated unfairly by the courts and juries, is probably the very fact that insurance law is still young in America and growing and changing from year to year. Indeed, insurance of any kind cannot yet be considered ancient. Less than a century and a half ago a learned English writer said that when insurance is mentioned by professional men they mean marine insurance.

The first reported case on insurance in this country was *Lord v. Dall*, 12 Mass. 115, decided in 1809, holding that life insurance contracts were valid, although not authorized by statute. The first American case in which mutual life insurance was considered arose in Louisiana in 1871, *Wetmore v. Mutual*, etc., Ass'n., 23 La. An. 770.

The first accident company appears to have been organized in London in 1849 and the insurance of real estate titles began in 1876.

Simpson in his admirable brief on "The Law Relating to Automobile Insurance" set forth the very recent and sudden growth of litigation in this field of liability insurance, from the first reported case, decided in 1907, to a total of over 1000 cases cited in 1928.

It is to be expected that in the early stages of litigation upon the rights of insured and insurer the courts and jury should be particularly jealous of the rights of the personal litigant, whose protection against wrong is of prime importance. Only as the legal principles involved in the relationship of insurer and insured become well defined, can our companies expect to approach more nearly an equality with the insured in the sympathies of court and jury.

CHANGING INSURANCE PROBLEMS

Moreover, the methods and business of insurance are changing so rapidly from year to year that the problems of insurance law seem not to lessen, but rather to increase. With each change in business new complexities arise, which must await ultimate judicial determination before the position of the insurer can be regarded as settled. During all this

period we may expect a conflict of decision; and, in consequence, we may find ourselves disposed to regard the courts at times as unfair. But in truth, as impartial arbiters, they are for the most part wholeheartedly intent upon applying to the relationship of insurer and insured, the fundamental principles of right and wrong so well established in the law merchant. Their purpose is at one with the first purpose of insurance, to-wit, to protect him who has suffered loss but has availed himself in time of the prudent assurance of indemnity afforded by the industry for which we speak.

Instances of these changes will occur at once to you, in your respective fields. I shall select only a few that occur to me, as emphasizing the need of preparing to meet radical changes courageously, to the end of accommodating our noble work to the best interest of the insured; by which I mean to render the insured the best service possible upon a sound insurance basis.

LIABILITY INSURANCE

In the automobile liability field, there is a troublesome issue spreading rapidly and widely, the question of immediate joinder of the insurance carrier as a defendant in the primary action for damages brought by the injured claimant. With increasing speed, a movement to permit such joinder is darting through the country. We stand aghast as we weigh the possibilities of ruinous verdicts at the hands of prejudiced jurors; and in such possibilities we have sought argument in opposition to the movement.

It is a fact that insurance companies writing indemnity bonds on jitneys and other public carriers have been compelled to submit to the statutes of several states, interpreted by the courts as rendering the carrier directly liable to the injured claimant. Whether or not this has resulted in larger verdicts is a matter which I must leave to your own industrious investigation. But this is true: regardless of the effect, the laws remain and our companies must find a way to conform to the command.

In some jurisdictions, recovery has been allowed against the insurance carrier in damage actions without joining the tortfeasor, this being based upon the theory that the carrier is made by law directly liable to the claimant upon proof of the tort by its insured.

In several of the states, notably Texas, Wisconsin and Washington, the joinder in one action of the demand against the tortfeasor and the lien upon the indemnity policy has been accomplished by judicial interpretation.

A similar decision was reached by the Federal Court at Los Angeles in an early case, *Moore v. L. A. Iron & Steel Co.*, 89 F. 73; but this decision has been questioned by the court in the later case of *Northam v. Federal Casualty Co. of America*, 177 F. 981, 985 (10-2-09).

On the strength of these authorities an attempt was made in California, where joinder of the insurance carrier is permitted in cases covered by public carrier ordinances requiring a bond inuring directly to the benefit of the injured person (*Milliron v. Dittman*, 180 Cal. 443, 181 Pac. 779 (1919); *Gugliemetti v. Graham*, 50 Cal. App. 268, 195 Pac. 64 (1920) to accomplish such joinder in a private automobile case. It was successful in the trial court. The appellate court, however, reversed the judgment below as to the insurance carrier upon the ground that although a demurrer to the complaint in this respect was properly overruled, the policy offered in evidence, as interpreted by the appellate court, did not inure directly to the benefit of the injured claimant and gave the latter no right of action against the insurer until after judgment obtained against the insured. A motion for hearing in the Supreme Court of the state was denied. (*VanDerhoof v. Chambon*, 8 P. (2d) 925, 121 Cal. App. 418).

The argument is made in behalf of joinder of the insurance carrier, that in fact every indemnity policy as now written and subject to statutes which have deflated the "no action" clause, must be construed as intended to inure to the benefit of the injured claimant as a direct indemnity, conditioned upon the legal liability of the insured tortfeasor. Professor Laube of Cornell University, writing in the *Pennsylvania Law Review*, December, 1931, defended the thesis that:

"... unless its primary object is a dedication of its assets or their equivalent to reimburse the victim, the policy falls under the condemnation of the law. He is the real party in interest and the saving of his tortfeasor from damage is, from a social point of view, but an incident of the transaction."

The contrary view has led to such extreme results as the denial of all recovery to the injured person after judgment against the insured, because of a settlement had between the insured and insurer, thus permitting the policy to be turned to an inhuman benefit certainly never contemplated when it was written. ("The Social Vice of Accident Indemnity by Herbert D. Laube," 80 *Penn. Law Review*, Dec., 1931, pp. 189-233.)

Some effect upon the final determination of this issue doubtless will be had by the Financial Responsibility Acts now appearing in the various states, under which our insurance companies agree to protect the insured. By the terms of these acts, as you know, the debtor in a personal injury judgment arising out of the operation of an automobile, is deprived of his operator's license, if within a specified time after the judgment becomes final it remains unpaid; and the operator's license will be returned to him only upon such proof of financial responsibility as is required by the statute, usually including a policy of public liability insurance. By the terms of the policy containing a financial responsibility clause, it may be argued, the company has agreed to pay the judgment against the insured within the period fixed by the statute and therefore is no longer in position to insist that its liability as indemnitor shall be determined, if it chooses, in a proceeding subsequent to the rendition of judgment against its insured.

It appears that actions to this end are pending in several jurisdictions other than those mentioned. What is to be the final outcome?

If we are to approach the problem from the standpoint of what is best for the insured and beneficiary, in order thereby also to benefit the company, there are cogent arguments in favor of the joinder. On the other hand, if the result would be to imperil the sound financial position of the liability companies, ready to protect the insured to the full extent of their available assets, prudently administered, then neither the injured claimant nor the insured would benefit by the joinder.

It will not do merely to argue that the juries are prejudiced. In many states the plaintiff may waive a jury in tort actions and such is often the case. Of course, it will not do to suggest that the courts, sitting alone, would be inclined to make findings in favor of plaintiff merely because payment would

come from the insurance carrier. If such a condition did exist, the best way to combat it would be to appear as actual defendant, whereupon such a motive of judicial determination would quickly disappear.

If Professor Laube is right, it is not sound reasoning to contend that the injured person is not the true and primary beneficiary of the insurance. Where there is legal liability on the part of the insured, unquestionably the policy can only be satisfied by payment to the beneficiary. The intent of the company and of the insured in writing the insurance, doubtless, takes no notice of benefit to the injured claimant. But the intent of the contract itself as distinguished from the intent of its makers, is plainly to make the injured person, when entitled to damages, the beneficiary of the insurance. He alone can give a final release.

Unless, then, we find sound reasons to combat the change, would it not be better for us and our clients to meet the situation by preparing to achieve justice to all concerned in one action? If this sounds revolutionary, if it smacks of treason to the insurer, all the more should it arouse your thoughtful consideration; because the shadow of the coming event has plainly fallen across our path.

Compulsory public liability insurance of all motor vehicles is another development likely to produce a change in public sentiment and the position of liability insurance carriers in the trial of damage suits. A movement seems to be gaining headway in the states to require a liability policy as a condition precedent to issuing an automobile license. When practically all automobiles operated on the highway will be covered by liability insurance, can it be possible that a jury will still be treated as unconscious of the fact? Is it not much more likely that under such conditions a jury would necessarily assume the presence of liability insurance and thereupon speculate as to the amount? Is it not also likely that the very fact that precautions are taken to conceal from the jury what it knows to be the fact, will have precisely the tendency which we seek to avoid, to-wit, to prejudice the jury against the hidden insurance carrier?

I do not advance these thoughts as firm conclusions on my part. They are tentative observations and I recognize them only as furnishing food for serious thought in the interest of those whom we are here to guide and protect.

LIFE INSURANCE

In the field of life insurance, I might mention an interesting conflict as to notice of forfeiture to be given the insured under the cash loan clause, where the policy has lapsed for premium default and the actuarial department discovers that the reserve for extended insurance is insufficient to purchase further continued term insurance. On the one hand, we have the rule now widely adopted by the federal courts, that the notice called for by the cash loan clause applies only to foreclosure of the lien upon the policy, occasioned by excess of the loan indebtedness over the cash value and does not apply where the policy is terminated upon lapse for premium default, the cash loan indebtedness, when deducted from the reserve for extended insurance, leaving no balance of reserve. (*Moss v. Aetna Life Ins. Co.*, 73 F. (2d) 339, C. C. A. 6th Circuit 11-7-34; also *Schoonover v. Prudential Ins. Co.*, 245 N. W. 476, 187 Minn. 343 (1932); on the other hand, we have the rule laid down in several jurisdictions that the policy cannot be avoided by using the extended cash loan indebtedness, except upon compliance with the notice required by the cash loan clause, even though the policy be in lapse for premium default. (*Carter v. Met. Life Ins. Co.*, 264 Pa. 505, 107 Atl. 847; *McDonnell v. Hawkeye L. Ins. Co.*, 64 S. W. (2d) 748, 751).

Here, again, the interests of the insured and beneficiary on the one hand seem to clash with the interests of the company on the other. Having had by cash loan the benefit of a substantial portion of the reserve accumulated on the policy, it is contended on the part of the company, the insured ought not to be held entitled to the same benefit over again for the purchase of automatic continued term insurance. The federal courts take the position that an insurance company could not exist should it thus pay out its reserve twice. But does the company pay out its reserve twice by making the cash loan to its insured and subsequently granting continued term insurance? Rather it invests such portion of the reserve in the very best security available, namely, its own policy, so that it is bound to have repayment of the loan if the policy continues in force, and if the loan indebtedness should absorb the entire reserve, then the company, which is obviously in a better position than the insured to know the fact, can readily give notice and foreclose in

due time. I suggest for your consideration, whether or not, under such circumstances, that company does best which recognizes an obligation, before claiming forfeiture, to notify the insured of the extent of his loan indebtedness and of the precise effect it will have upon lapse for premium default. If the best service to the insured and beneficiary make for the prosperity of the company, then the rule of the federal courts might well be discarded and the more beneficial holding in the cited Pennsylvania and Missouri cases followed as a matter of policy.

THE NEW DEAL

Within the month, the New Deal has given birth to its latest child, the social security law, which is bound to have a serious effect upon the business and, probably, the law of life insurance. Mr. Early, the President's secretary, was reported as saying that the President used some thirty pens to sign his name to the bill in order to fulfill requests for souvenirs. The exact value of these souvenirs cannot yet be estimated, as it may take some time for the Supreme Court to pass upon the infant law.

That it will seriously affect the business and law of insurance is self-evident from a mere glance at its major provisions, which include:

Federal grants to the states on a 50-50 basis for pensions to needy persons over 65.

Beginning in 1942, contributory old-age pensions, ranging from \$10.00 to \$85.00 a month, raised by eventually taxing employees and employers.

Unemployment insurance by taxation of payrolls.

Appropriations totaling 50 million dollars the first year for aid to dependent or crippled children, mothers' aid and other welfare activities, the same to be matched by the states.

The expectations of the President are summed up in the concluding sentence of his speech accompanying the signing of the measure, as reported in the press, to-wit:

"If the Senate and the House of Representatives in this long and arduous session had done nothing more than pass this bill, the session would be regarded as historical for all time."

While it may be a matter of doubt as to whether this measure was needed to render the session of the national legislature historic for all time, doubtless the social security law is so vast in its extent and comprehension as to warrant the President's expression. Whether it will stand the test of constitutional guaranties is another question, which for the present we may prudently pass.

To me it is interesting to observe that the expressed purpose of the social security law epitomizes the age-old, well known and most beneficent purpose of the work in which we are engaged in the insurance field. The President said:

"The civilization of the last hundred years, with its startling industrial changes, has tended more and more to make life insecure. Young people have come to wonder what would be their lot when they came to old age."

Is not this a splendid selling argument for the insurance afforded by our companies in the various fields? For years insurance agents have been trying to convince the public of the wisdom of providing for old age by investing the surplus acquired by youth. Not without success, at least in the life insurance field. On January 2, 1935, John W. Davis, being asked to name within 10 million approximately how many life insurance policies are outstanding in the United States at the present time, said that the estimates vary between 75 and 122 million. More or less, this amounts to one policy for every adult.

Shall we welcome the entrance of the federal government into our field or shall we view it with alarm? If the effort of the government will result in spreading the thought of insurance, it may give wings to the argument of our field agents. On the other hand, so long as it is active, will it not lull into a false security the many unwritten prospects among the youth of the country?

It occurs to me that in the face of the uncertainties before us and the appalling disaster which will befall our people, should they take confidence in the social security law as a panacea of insurance against future want or distress, only to find the magnificent structure suddenly fallen to the ground and their hopes dashed by the inexorable application of constitutional guaranties, which seem clearly enough to exclude the federal government from participation in such personal problems,

we are called upon, as insurance counsel, to bend every effort, first, to a study of the new law with a view to ascertaining its influence upon the welfare of the people; the chances of its success or failure as a practical measure; and its conformity with or repugnance to the principles of our federal Constitution; and, second, to bring about as speedily as possible, a final and correct adjudication by the courts.

The next confinement of the New Deal appears to be promising us an offspring which may be called "Taxation for Confiscation." The prenatal name selected is "Soak-the-Rich," or "Soak-the-Thrifty" or again "Share-the-Wealth." If it is not merely a threat, exploited for the purpose of coddling the little man, who is, of course, the chief taxpayer, into a sense of security while in fact the New Deal is reaching deeply into his pockets by the simple process of reducing his little exemption at one end and increasing the normal tax at the other, then indeed it is fraught with the greatest consequences to the business of life insurance. Well, we know that whatever affects the business, brings changes also in the law of life insurance. So that, viewing the shadows of the coming events, it is incumbent upon us again to devote intense study to this revolutionary phase of the New Deal.

Of course, the first reaction to the possibility of the confiscation of wealth by inheritance taxation, will probably be a vast increase in resort to life insurance as a means of escaping the tax. Just how Mr. Edsel Ford and his father—whose passing we may well hope shall be long deferred, at least until the New Deal either has been laid to rest or brought to reason—just how these gentlemen will arrange for 370 million dollars insurance upon the life of the elder, and whatever the amount may be vice versa, is a problem for the home office. Were I prepared to solve it now, I would be at this moment in Detroit and you would be relieved of the duty of paying your courteous attention to my report of what I see in the glass ball. The opportunity appears golden for the ambitious salesman of life insurance.

But the mammoth growth of taxation of every kind, state and federal, threatens indeed to engulf, not only the insured, but our companies as well, since it reaches the assets of which they are the guardians. Again the falling shadows warn us to watchfulness and prayer, lest the good cause which we lead be

overwhelmed by disaster. Already legislation facilitating the repudiation of solemn contracts of loan have threatened the security of our companies' investments. The gold clause cases, the decisions on moratoria, the accumulating statutes which prohibit deficiency judgments after foreclosure, have had their effect upon the soundest investments. What is yet to come from the radical course demanded of Congress by the administration on the one hand and by the very dissatisfied groups of "Save the Loafers" on the other, is still too much blurred in the shadows of the future to permit the hazard of a forecast.

That the constitutional safeguards, upon which until now we have relied, stand in dire peril, must be obvious. When even a chief executive, facing triple rejection by the judgment of the highest court in the land upon the constitutionality of the New Deal's outstanding measures, urges Congress to pass similar legislation in disregard of its constitutionality, there is a threat of which every lawyer is bound to take sober notice. Does it mean that the leaders of the New Deal are convinced that before the new legislation reaches the supreme tribunal, either the Constitution will have been altered to meet their demand or the personnel of that court, by retirement, death, or other change, will have succumbed to their views? The thought is sobering indeed! Can anyone say it is not well founded?

And if such is the mind of the New Deal, does not the Social Security Act portend a most serious change in the field of insurance? Is, perhaps, exclusive federal insurance the real goal? At least, it would be quite in conformity with the ambitions of the government disclosed since the forgotten man was raised up in the throes of a political campaign, crowned with success, glorified and then dropped into innocuous desuetude from which no forgotten man ever returneth!

But the New Deal is nothing if not generous! There is hope for the established insurance companies. The President has confessed, in his speech when signing the Social Security Act, that there is room for our companies. I quote his words:

"We can never insure 100 per cent of the population against 100 per cent of the hazards and vicissitudes of life. But we have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age."

Just what percentage of insurance is left for our clients has not been officially disclosed. I venture the humble estimate, however, that in the end, the percentage of potential insurance remaining for them will be not less than 100.

Let us take comfort in the thought, soberly and calmly, that, after all, the only sound insurance against the vicissitudes of life, is that which the individual citizen himself builds up under the guidance of prudent leaders, whose judgment is not shifted as the weathercock by every changing wind of popular favor or illusion, whose responsibility cannot be dropped as so much dust at the end of a political campaign, whose soul is not expressed in a party platform but in the decalogue of all time. I say to you, my fellow

insurance counsel, that when the New Deal has joined the forgotten man, the business of life insurance by private companies, owned by those who invest therein, will triumph and flourish.

In this wild conflict of passions and theories, in this mad orgy of promises and enticements, in this frightful rebellion of leadership against all the lessons of the past and the hard-won guaranties left by our fathers, it is for us insurance counsel to guide our clients, faithfully and fearlessly, upon the principle so beautifully painted by the poet:

*"Because right is right,
To follow right,
Were wisdom,
In the scorn of consequence."*

An Introduction to the Common Law of Life Insurance

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THIS paper will deal in a very brief way with the practical phases of the history, the methods, and the objectives of the common law as it affects insurance, and particularly life insurance. Its purpose is not to outline the common law of insurance in terms of rules of law but to examine what is antecedent to the rules and to test their validity.

I.

It is familiar learning that the law and the judicial system of the United States were derived from those of England. At the time of the Revolution the common law of England was the law of the Colonies, and courts organized and operating under the common law system were applying the common law in the administration of justice. The common law system of developing a body of law through the medium of judicial precedents became and has remained a primary feature of the American legal system.

The common law, while going back to England, has its roots in even more ancient systems of jurisprudence, particularly in those of the early Germanic peoples. It had its beginning and early development in a society organized largely on the basis of relationships. A man was either born into a status to which

there were attached certain enforceable rights and duties or he entered into relationships, the law of which determined his rights and his obligations. The idea of controlling conduct by imposing duties and standards of conduct on relationships became the central idea in the common law system. Even to this day, when one consults a digest of modern case law he finds it divided largely on the basis of relationships, such as master and servant, landlord and tenant, husband and wife, principal and agent, and a great many more. The principle involved is that the law imposes on persons who enter into these relationships certain reciprocal rights and duties quite apart from any agreement between themselves. If one person appoints another his agent, there is imposed upon him and upon the agent mutual obligations which they must observe even though there may have been no understanding or contract between them. A more obvious example is found in the relationship of husband and wife. The husband is legally obligated to support the wife, not because he has made a contract with her to support her, but because he has entered into a relationship to which the law has attached certain duties. In fact the common law groups the law of husband and wife, and parent and child under the significant title of Domestic Relations.

Under the common law system, if a dispute arose between persons standing in a legal relation the court in deciding the dispute did not turn to a code of laws for the rule of decision, as a judge in a Roman law country would do, but decided the case in accordance with the customs of Englishmen. What did the general conscience of the people as expressed in custom declare to be right, and fair, and just? This is an approach unique to the common law system, and through it has arisen a body of case law expressing those customs of fair dealing as found by the courts. This case law which is in the form of judicial opinions is called the Common Law. The judges, in theory, were simply declaring the existing law but in novel situations at least, the conscience which they consulted was their own rather than the conscience of the people as expressed in custom. Even the binding effect of prior decisions is, under the common law system, largely illusory and courts have not infrequently departed from precedents which they thought to have been wrongly decided. The changes in the common law are generally gradual, following changes in general views, and to the extent judges share the views and convictions of their contemporaries, the law follows the common conscience.

Contracts, of the general nature of those now employed in insurance, were not known in the early days of the common law, but as time went on, the law came to recognize and enforce certain obligations which one voluntarily imposed upon himself by his contractual undertakings. After the Norman Conquest, the use and legal recognition of contracts as a medium for the imposition of duties grew steadily, and in time the law of contracts became, and still is, one of the major divisions of the common law. The development of the law of contracts was slow and contract law became highly formal. The common law did not take readily to the idea of compelling a man by legal means to live up to his promises. Contracts to be enforceable had to be based upon recognized formalities. To this day, many of these formalities, still prevail in the law of contracts; as for example, the legal effect given to seals, and the requirement of consideration.

Maine, a widely read legal historian, writing in 1861, stated that the progress of the law could be seen in the transition from status to contract. Maine, in making this statement, was speaking of the Roman law, and of only a very narrow branch of the Roman law. But

the idea of a definite trend from status (which was taken to mean the status element in legal relations) to contract was taken up by many legal writers who carried the thought much further than Maine's original conception. The theory found much favor in the United States. It seemed to fit extremely well into the American notion of individual freedom, that no man should be bound except by his voluntary undertakings, and the stoical conception of duty taken over by American individualism, that if one made a contract, no matter how strict or harsh its terms, it was for him to abide by it. The law was profoundly affected by this thinking in terms of individual freedom which was going on in the fields of politics and economy, as well as in the law. It is during this period one finds most of the insurance case law in which only the strictly logical necessities of the contracts determined the result.

In other departments of the law, the emphasis was also being placed on the determination of obligations by contract rather than by relationship or status. While the theory was a very engaging one, a definite trend in the opposite direction soon became manifest. The complexities of industry, and the requirements of a more highly organized society, brought about a toning down of the emphasis on the absolute freedom of contract. The theory of two free men contracting with one another on an equal footing could not, it came to be believed, be applied to such relationships as that of an individual shipper dealing with a railroad when there was no other railroad within a thousand miles of his plant. Consequently, in legislation and in case law there was a gradual return to the placing of more emphasis on relationships. The law undertook to define what the rights of the parties in particular relationships should be, quite apart from agreements, and also to determine what agreements if any should be permitted in certain relationships.

II.

In the law of insurance this change in emphasis was particularly evident. Statutes requiring standard policy provisions were enacted on every hand. These statutes provided that if insurance contracts were entered into, prescribed terms which would determine the rights and obligations of the parties had to be included. Other statutes prohibited the use of certain policy provisions. When mod-

ern statutory law controls the legal incidents of the insurer-insured situation by prescribing and prohibiting contract terms, it is only doing exactly what the common law did when it declared that those who entered into legal relationships should be bound by certain rules, whether they agreed to them or not. Whether a relationship is governed by a contract prescribed largely by law, or directly by the law itself, the result is the same.

The statutory law, as will be seen later, also extended a control through the medium of procedure, prescribing for example what should constitute a defense of fraudulent procurement, or prescribing that certain defenses should be available to insurers only in restricted circumstances. The trend from the theory of absolute freedom of contract and no liability apart from contract, toward something closely resembling an early common law relationship is quite evident in the field of statutory insurance law.

The shift in emphasis in the field of the common law of insurance took place in quite a different fashion from that which went on in the field of the statutory law. The courts in administering the common law were bound to observe the rules of contract law, and the common law knew of no such relationship as insurer and insured; consequently, the trend in the case law of insurance from pure contract law towards a relational law has been gradual and often quite obscure.

On the surface of things the theory of contract and the law of contracts are the dominant conceptions in the common law of insurance, but underneath the surface there has gone on a very definite drift toward the establishment of a common law relationship of insurer and insured. This has been accomplished largely by the judicial technique of applying contract formulas and using contract terminology in arriving at relational results; that is to say, results which the courts feel are required by their conceptions of justice quite apart from agreements. The results predicated on judicial conceptions of justice may not in fact be just results at all, but they appear to the courts to be so. The validity of these judicial conceptions of justice which play such a large part in the common law of insurance will be examined later in this paper.

The trend in the common law of insurance from the pure contract method of determining rights by the logical necessities of the language in the contracts, towards the common

law method of determining rights by judicial conceptions of justice, can best be shown and explained by an examination of the basic judicial methods employed.

An ancient and common cause of disputes, and consequently of law suits, is the inability of the parties to a written contract to agree upon the exact meaning of the terms which they have employed. Unforeseen developments and unprecedented situations, coupled with the limitations imposed upon the expression of thought by language itself, often lead to honest disputes as to just what a contract which once seemed very plain really means. In the disposition of such controversies, there grew up in the common law the rule that if there was any ambiguity in a contract the exact meaning of which was in dispute, the court in construing the contract would construe it strictly against the person who drafted the document. This is purely a rule of contract law but it will be seen at once that it has vast possibilities and it has been greatly employed in deciding controversies affecting insurance policies.

The cases in which this doctrine is employed are generally those in which the insured seeks by his construction of the contract, to extend it to cover a loss which, in the insurer's opinion, is not covered by the contract. Now if the court feels that its conception of what is just calls for a decision for the insured, it is a very simple matter to say that the contract is ambiguous because there is a dispute as to its meaning, although this, of course, does not always follow. However, once the court says that there is an ambiguity, it follows that the contract must be construed strictly against the insurer; which can easily be done by accepting the insured's version. This results in giving the insured what he wants and what the court thinks he should have, though it may be quite different from what the contract was designed to accomplish. This is one of the most common methods employed in getting relational rather than contractual results in controversies between insurer and insured. The end is accomplished by employing on the surface of things pure contract law.

Some of the most interesting methods are those which are employed in connection with the technique of a law suit. It is familiar law that the plaintiff has the burden of proof, and failing to sustain that burden, must lose. Consider now one typical and common example of how by shifting the burden of proof, a

result which the court thinks just is reached, though it may not be one which is logically required by the facts and the terms of the contract.

Assume that an insurer has promised to pay to the beneficiary a stipulated amount upon receipt of proof that the insured's death was caused by accidental means. The insured is found dead, a pistol shot through his head and a discharged pistol by his side. Just exactly how he was shot no one knows. The beneficiary by suing on the contract should prove a death by accidental means but of course that cannot be done because there is no proof available, nor by the same token can the insurer prove a non-accidental death such as suicide. Consequently, whoever has the burden of proof must lose. Accordingly, by the use of a presumption, not originally used for that purpose, some courts have shifted the burden of proof to the insurer which means that the insurer loses. Thus, a result which appears to the court as just is obtained and the contract plays no part in getting it, except to measure the amount of the judgment.

The burden of proof is, of course, but one phase of a law suit and ceases to be of primary importance when there is evidence on both sides which requires a submission of the case to a jury; but here again, a trial court or an appellate court in reviewing the decisions of a trial court, has rather wide powers in determining what evidence shall be heard and considered by the jury. Historically, the jury is the judge of the facts and the court is the judge of the law. Just where the line is drawn is for the court to decide, and where it is drawn may often determine the outcome of the case. The courts, by acquiescing in general jury verdicts which find the facts so as to permit recovery under the contract in suit, often permit the result of a law suit to be one not contemplated by the contract but one which they feel to be required.

The courts also have the power to determine, to a large extent, the issues on which a law suit must be tried. How these issues are selected and stated often have a determinative effect on the outcome of the case. To illustrate: a life insurer's case is that the applicant had a serious disease which he did not disclose in his application, and it requests the court to be relieved, by a judicial cancellation of the contract, from becoming bound to an uninsurable risk. The issue can be whether the insured was in fact uninsurable and se-

cured the policy on an application which did not disclose that fact. If the issue is so stated, the insurer can easily make out its case. But if the court says that the sole issue is whether the insured got the policy by fraudulent misrepresentations wilfully made for the purpose of deceiving the insurer, then the insurer may easily fail, because it is difficult to prove that someone acted wilfully and fraudulently to gain a given end. This example will be enough to illustrate the importance of the issue-determining power of the courts, and how it can be used to get results which the courts feel justice requires.

The doctrines of waiver and estoppel have been widely employed in a multitude of fashions, most of which are too involved for this article, for the purpose of attaining ends which do not follow logically from the insurance contract and the proven facts. A brief discussion of the nature of these legal conceptions will disclose the many uses to which they can be put. Waiver is defined as the intentional relinquishment of a known right. Estoppel is defined as the legal preclusion from the assertion of a right. One example will perhaps suffice. An insurer issued a life insurance contract containing a provision that it should be void if the insured entered the military service. When he sent in his next premium he informed the insurer of his military service. The insured entered the army and later was discharged. When he sent in his next premium he informed the insurer of his military service. The insurer accepted the premium and stated that it would not take advantage of the insured's military service to void the contract. In such circumstances the insurer is said to have waived its right to void the contract on account of the insured's military service. Now assume the same facts with the only exception that the insurer accepted the premium and said nothing. If the insured should then die it would be said that the insurer was estopped or barred from setting up the defense that the policy is void, because it would not be equitable to permit it to do so.

It will be readily seen that by finding collateral facts sufficient to constitute a waiver or to raise an estoppel, it is possible for the court to avoid a result called for by the contract and the undisputed facts constituting the insurer's defense. The insurer's defense is conceded but avoided. This technique has been widely used in a variety of circumstances in the law of insurance. Waiver and estop-

pel are truly *les enfants terribles* of the law of insurance.

There are also some obvious instances of the trend under consideration in which the court has simply refused to follow the terms of the insurance contract. Recently the supreme court of a mid-western state openly refused to follow the contract when it would have been necessary to decide for the insurer, if the court observed the distinction between contracts insuring against injuries caused by accident, and those insuring against injuries caused by accidental means. The court conceded that the insurer had not promised to pay unless the insured was injured by accidental means, which he admittedly was not; still, they decided for the insured, pointing out that they did so because they thought he should in justice have the money. This is a typical illustration of the common law method of disposing of relational controversies by judicial considerations of abstract justice, rather than by contract or statute. The court also founded its decision on another typical common law conception, the notion that the common man, or the average citizen, would understand the contract as calling for a decision for the insured.

In making the initial determinations of whether there is an ambiguity in a contract; which party shall have the burden of proof; what evidence shall be heard or believed; how the issues are to be stated; whether on disputed testimony to find the facts so as to raise a waiver or estoppel; or whether to affirm a general jury verdict, the courts proceed in the strictly common law judicial fashion of being guided by their conception of what is right in the situation. That conception of justice and not the contract is what really determines the outcome.

In general, the statutory law has sought to control the situation by much the same means. By prescribing the terms which must be contained in an insurance contract the legislatures have accomplished directly what the courts in some instances sought to do by the construction of existing contracts. The statutory law has not undertaken, as the courts have, to fix the burden of proof as a means of control, but rather has exerted its control by defining what proof shall in certain cases constitute a defense, such as requiring that in a suit on a life insurance contract, a defense of suicide shall not be available unless the insurer can prove that the insured took out the policy with the intention of committing sui-

cide. The statutory law has also extended its control by defining the issues in certain controversies concerning insurance contracts, as is shown by the many statutes making fraudulent procurement the sole issue in misrepresentation cases. In the field of waiver and estoppel the statutory law is again evident, prescribing for example that insurers shall be bound by the waivers made by its agents, or estopped from setting up certain defenses to life insurance contracts if there has been a medical examination. Jury verdicts are not controlled directly by legislation, but the statutory law has used them in extending its control by providing that in controversies affecting insurance contracts, certain issues must be passed on by a jury and attempting to make the jury's verdict conclusive.

It will be clear from what has been said, that the trend has been, broadly speaking, along the same lines in both fields of the law, and the result of any particular law suit is often determined by an intricate interplay of the two.

III.

Henry Adams, witnessing the marvelous achievements of science in the 19th century, thought of developing a science of history. He toyed with the idea of ascertaining whether history was not governed by unalterable laws of movement, by picking out definite points in the past and drawing lines between them and his own time. The return of uncertainty in fields which 19th century scientists had supposed to be governed by eternal invariables has destroyed Adams' premise; still, his method is one which has its uses. It may not enable us to predict with certainty but it enables us to see more clearly just how far we have moved and the general direction of the movement. With this much less pretentious thought in mind it will be instructive to compare two rules of insurance law as they existed in 1766 with the law as it generally exists today. This method will illustrate in another fashion how far the transition under consideration has gone.

In the year 1766, the Earl of Mansfield was the Lord Chief Justice of England. Lord Mansfield had brought to his position an extraordinary variety of qualifications, and became perhaps the most famous judge in the history of English law. In that year there came before him the case of Carter against Boehm. In rendering his opinion in that case,

Lord Mansfield showed an extraordinary insight into the nature of insurance, and laid down rules of law which coincide precisely with the nature of the insurance contract. His opinion in that case is undoubtedly the soundest insurance opinion ever written on the points involved. Lord Mansfield declared the law to be:

"Insurance is a contract upon speculation.

"The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.

"The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement.

"The policy would equally be void, against the underwriter, if he concealed; as if he insured a ship or her voyage, which he privately knew to be arrived: and an action would lie to recover the premium."

Two simple principles can be drawn from Lord Mansfield's opinion: first, he recognized that the insured generally knows more about the risk than anyone else and that the insurer is forced, by the very nature of the transaction, to trust in the integrity of the insured not to hold back any relevant knowledge which he has; and secondly, that for the insured to keep back such knowledge is a fraud upon the insurer even if such knowledge is kept back through mistake because in such case the risk which was contemplated would not in fact exist. Now, contrast briefly these principles with two fairly general principles that exist in the insurance law of today.

The law as declared by Lord Mansfield was that the insurer was entitled to rely on the truthfulness of the insured to make a full disclosure of all of the relevant knowledge he has. Such is not the general law of today. It is the general rule that unless the insurer asks

specifically for certain information the insured is not required to divulge it, and even in answering questions which are put to him by the insurer, the insured's answers need only be literally correct. In a few jurisdictions even a partial disclosure, in some circumstances, is deemed to be sufficient, the law being that the insurer is not entitled to rely on the truth of the insured's disclosures but must question them and investigate for itself. In a recent case, the insured had denied in answer to one question that he had ever had cancer, and disclosed in answer to another the name of his family physician. The denial of cancer led the insurer to believe that the insured had seen his family physician for minor ailments not inquired about in the questionnaire. The fact was that the insured was dying of cancer at the time he applied and was being treated for that disease by his family physician. The court said that the insurer was not entitled to rely on the truth of the applicant's statement that he had never had cancer, but should have gone to the family physician and made inquiries. As the insurer, relying on the honesty of the insured, had made no investigation it was required to pay the full amount of the policy on a risk it never intended to assume.

Secondly, the law as declared by Lord Mansfield in 1766 was if the insured kept back any knowledge which he had, it was a misrepresentation even though the knowledge may have been kept back by mistake. That is not the law of today in all jurisdictions. The law in some states is that misrepresentations to invalidate the policy must have been made fraudulently and with the intent of deceiving the insurer. This requires that the applicant know of the undisclosed facts. Under the law as it now exists, in those states, the insurer may become bound to a risk even though the risk may not have been the one contemplated by the insurer and the insured. Assume that a man having cancer and not being aware of it applies for a life insurance policy. It is the intention of the insurer to take a well man, and it is the intention of the insured that a well man be insured because he thinks and represents himself to be such. Now is the insured were to die shortly after the policy was issued, there would be no liability under the law as it existed in 1766 because the risk which was contemplated was the risk of a healthy man, and not the risk of a man with cancer. But, under the law of today, the insurer would in some states be

bound to such a risk because there was no intent to defraud.

From this very brief comparison of the law as it existed at the beginning of American law and as it exists generally in 1935, the course which it has been following is clear. Lord Mansfield decided *Carter against Boehm* on strict contract principles, namely that there must be a meeting of the minds of the insurer and insured on the precise risk to be run and if for any reason, such as lack of knowledge, the minds did not agree precisely, then there was no liability. In the law of today that is not the approach. The courts (often in obedience to statute) do not go back to the first principles of contract law to determine whether the insurer shall be bound but decide largely on abstract principles of equity. This is done by taking the issue out of the field of pure contract law, and placing it in a situation which can be governed as a common law relationship. In such situations the court and not the contract is supreme.

This transition has been gradual and has embraced at least the last half century. The change in the commonly accepted views as to how far the freedom of contract should be permitted to go was not only reflected in the course of legislation but also in the course of the judicial or common law. The movement towards a common law relationship of insurer and insured called only for a reversion to older paths of the law, rather than the breaking of new ones, and the employment of a technique which judges were using daily in the disposition of non-contract controversies. In consequence the change moved rapidly. The change in emphasis came easily to judges trained in the principles of the common law. They were accustomed on every hand to deciding what rights, duties and obligations were imposed upon individuals by considering the common law rules governing their legal relationships. They were accustomed to seeking what to their minds constituted a just result and that is what they did in insurance cases, but in doing so they seldom departed from the technique of pure contract controversies. Because of this difference between what the courts were really doing, and what they said in their opinions they were doing, the change that was actually taking place in the law was not always clear.

A more immediate force which made itself felt during the early transitional period was the prevalence of misconceptions as to the nature and purpose of insurance. Organiza-

tions of every sort purporting to be writing insurance had sprung up like mushrooms. These undertakings were seldom launched with the intent of defrauding the public, but a great many were doomed from the beginning because of a lack of the requisite knowledge on the part of their founders. When the inevitable came, there was much bitterness against insurance, when in fact the evils and losses were due to a lack of any real insurance at all. The courts, not always aware of the source of the trouble, sought to correct matters by judicial decisions but as these were generally of a risk enlarging nature, they only hastened the end they sought to avoid. The common law of insurance by seeking to correct a condition which of necessity could be handled only through the medium of statutory law, ran far afield and established exceptions and innovations in insurance contract law which have since been put to demonstrably harmful uses.

A more recent force which has given impetus to the trend of judicial decision towards a relational approach has been the course of recent philosophic and theoretic writings in the law. The past two decades produced the school of Neo-realism and witnessed a great revival of the study of sociological jurisprudence. The Neo-realists have emphasized the judicial control over what, in orthodox legal theory, is controlled by contract or fixed substantive law. The writers in the field of sociological jurisprudence, some of whom hold high judicial office, have given currency to the idea of making decisions solely on the basis of what is, to the judicial mind, socially desirable—an idea fraught with grave danger in the hands of a judge less than omnipotent. From the orthodox view, the only possible course for a court to take in enforcing a contract is to enforce it as written. The Neo-realists would have the courts believe that this is an illusion, and the Sociological school would have them believe it to be undesirable as a fixed general principle.

The control asserted by changing views in a changing world, the trend of legislative law, the failures during the experimental stage of insurance, traditional habits of judicial thought and method, and current convictions as to the end and purpose of law, have all made themselves felt in bringing the law of insurance to its present too highly relational state. The result, broadly speaking, is that we have a relationship, or insurer-insured situation, controlled by legal rules much as legal

relationships are controlled, but with the very important exception that there is the counter-control exerted by the contract between the parties.

Well over a generation ago, the trend towards the establishment of a judicially controlled legal relationship of insurer and insured gave rise to a real struggle, the history of which is written large in the reported judicial decisions. The courts were starting to exercise what they conceived to be their common law right to control the insurer-insured situation as a legal relationship. On the other hand, the insurers, realizing the dangers of such an uncertain control, sought to control the insurer-insured situation solely by contract. There was much re-writing of contracts calculated to avoid or minimize the effect of the decisions extending the judicial control. Much unsound law was written and, in some instances, these attempts to curtail their control drove the courts farther than they had perhaps originally intended to go. The same struggle but in a different form went on in the field of legislative law. The history of those struggles, as now seen in retrospect, brings into sharp relief the movement of the law.

IV.

The question suggests itself as to whether the infusion of the common law relationship element into the insurer-insured situation has been desirable. Whether the statutory law should have exercised the control which it has over the institution of insurance is a separate question. But in the common law, with which this paper is concerned, the trend has been definitely towards an enlargement of this relational element, and it is time that the premises and the dialectics of that movement be examined in the light of the present situation.

We may take as a postulate of the present, that insurance is a socially desirable and economically necessary institution, and that its efficient and proper functioning is a matter of grave general concern. The institution of insurance in some form touches everyone. It is the avowed purpose of the common law to observe and reflect the accepted postulates of the time and place in which it is being administered. It is this purpose which justifies its method. It follows then that for the common law to fulfill its high purpose, it must bring the common law of insurance into accord with sound and efficient principles of insurance.

It will be instructive to test by its own standards the trend in the common law towards the establishment of an insurer-insured common law relationship, with a view to ascertaining its soundness as a matter of principle. Unquestionably, the institution of insurance should not only be permitted but should be encouraged by the law to operate soundly and efficiently. Obviously, this requires that it be permitted to write insurance contracts on insurance principles. The laws of mortality and mathematics and all of their necessary implications must be fully recognized. This also requires a clear recognition of the ancient fact that something cannot be made from nothing. It is clearly a corollary of our first premise, namely the necessity of sound insurance, that the essential principles of insurance must be observed by the common law.

One of the methods by which the trend towards the establishment of a common law relationship of insurer and insured has been making itself felt, is the enlargement of the coverage granted by insurance contracts through judicial interpretation. If the judicial construction of an insurance contract enlarges the risk beyond that contemplated by the premium paid, it is of necessity wrong on common law principles in that it is not in the direction of serving the common or general good. It is simply a sacrifice of the ultimate for the immediate. The judicial approach in the true common law method should not be a search for ambiguities so that the scope of an insurance contract can be extended, but rather an impartial reading of the contract with a view to determining whether it cannot be sustained as one written on essential insurance principles. To write its contracts on a sound and solvent basis is always the intent of the insurer, otherwise it could not exist, and it is seldom that the intended risk cannot be plainly seen from the contract. Contracts written with a premium which is adequate only to carry the expressed risk cannot be converted by interpretation into broader contracts with an inadequate premium without there being a loss. Decisions which look away from the ultimate good of the insuring public, which is the real loser, towards the immediate, the particular claimant, are demonstrably detrimental to the advancement of the law. Unless the common law moves towards the establishment of definite and generally desirable principles, the process of deciding insurance cases is simply a meaningless grinding

out of decisions which do nothing but dispose of the immediate controversies and breed more. Such should not be the destiny of the common law of insurance and such is not the judicial function under the common law system. Of course if an insurer, through ignorance of insurance principles, should actually write a contract with an inadequate premium, it must abide by it and not expect the courts to correct its insurance mistakes. That is an entirely separate matter.

For a court to take relational approach through the medium of shifting the burden of proof is inevitably to arrive at a decision which is not just when tested by traditional common law principles. To illustrate: by insuring against a specified form of death, a life insurer must of necessity, if its contract is to be within the reach of the millions who need the protection it affords, fix a premium which contemplates only that particular form of death. If the insured's death comes about in the particular manner insured against, it is a very simple matter to submit proof of that fact. Now, if the burden of proof is shifted to the insurer to prove that the insured's death did not take place in the manner insured against, the coverage of the contract is obviously extended to take in all deaths which are of an unprovable origin, and a premium is placed on the suppression of evidence. This is obviously unsound insurance and, on traditional common law principles, it is unsound law because it clearly does not serve the ultimate common good.

In determining the methods by which the law was approaching a common law relationship of insurer and insured, we noted the method reflected in the decisions requiring proof that a policy was procured by fraud, rather than proof that it was procured on a risk which was uninsurable, to sustain a defense of misrepresentation. An insurer must accept only insurable risks—that is axiomatic. An insurable risk to a life insurer is a person whose health, occupation and mode of life meet the standards of insurability contemplated by the premium charged. If a person who has cancer and does not know it secures a life insurance policy through mistake, sound insurance principles require that the transaction be undone. However, if the legal test as to whether the transaction should be undone is to be solely whether the policy was secured by fraud, it is plainly wrong because a state of mind which has nothing to do with insurability is substituted for a state of health which,

on essential insurance principles, determines insurability. Also the difficulty of proving a fraudulent state of mind by legal evidence offers unusual opportunities for the perpetration of fraud. Sound insurance underwriting requires that the test of liability be actual insurability, and such by its own standards should be the legal test.

In examining the use of the doctrines of waiver and estoppel to enlarge the legal relationship element in the insurer-insured situation, it was noticed that this amounted to conceding a defense and avoiding it because of some collateral facts. Here again the common law of insurance is bound to flow in the wrong channel if it looks towards the disposition of an immediate case as against ultimate justice, namely the principle that only insurable risks should be insured. It should not be the policy of the law to compel insurers through the medium of judgments to accept uninsurable risks. Any means which makes it possible for an insurer to be compelled to assume risks not contemplated by the premium paid is essentially bad on fundamental common law principles. Further, the existence of a means whereby an uncontradictable defense of uninsurability can be avoided presents powerful temptations.

Nothing can be said in defense of any trend in the law which advances by means of disregarding the plain terms of lawful contracts. This is true whether the courts do so directly, or indirectly by affirming general jury verdicts which are plainly at variance with the contracts. The method of disregarding clear and lawful contracts for any purpose is undesirable on the most elementary principles of insurance and of law.

It is clear that these methods of advancing the law towards a common law relationship of insurer and insured are bound to direct the law away from what is ultimate justice. In this connection it is important to observe that the means under discussion are clearly instruments of justice in proper situations. That is not questioned. These methods have long been employed in the common law with highly desirable and beneficial results. This inquiry is not whether these means are desirable as judicial methods, but rather whether their employment in the disposition of controversies concerning insurance contracts, tends towards the establishment of principles of law which are in accord with the avowed ends of the common law, and the requirements of the institution of insurance. It is clear that they

do not in that they all result in the enlargement of the scope of insurance contracts beyond that contemplated by the premiums paid, and this does not make for sound insurance and accordingly is unsound common law. These methods have brought about the very undesirable result of increasing the cost of some forms of insurance, and even depriving the general insuring public of a form of insurance for which there is a definite need. Witness the experience of the casualty insurers in certain fields, and of the life insurers who were insuring against total and permanent disability. These results clearly demonstrate the undesirability of undermining insurance contracts by the creation of a common law relationship.

The second undesirable feature of the trend towards a common law relationship of insurer and insured, is the injection of uncertainty in an undertaking which of necessity requires certainty and predictability. To be able to write long term insurance contracts on a proper basis, it is essential that the insurer know the exact risk which is being assumed, in that all of its essential computations are based on the assumption that a contract will mean the same thing years hence as it means when written. This does not require that all law stand still. Roscoe Pound, a profound common law scholar, and certainly not a reactionary thinker, emphasizes in his works on the common law, the importance of there being stability in the common law affecting long term commercial transactions, even though change may be highly desirable and even essential in other situations. Uncertainty in the law of insurance is undesirable to both the insurer and the insured, and promotes litigation of a wholly unnecessary sort by raising doubts which the very contracts in litigation were intended to avoid. A recognition of this need of certainty requires a reversion from the trend in the law which creates uncertainty. The mechanical enforcement of contracts is, of course, not possible, but in long term contract undertakings, such as insurance, stability and predictability are an undeniable necessity, a necessity which the future of the common law cannot overlook, if it is to serve its purpose.

The third undesirable feature of the trend under discussion is a definitely unpleasant one, still no proper development of the law of insurance can overlook the plain fact that insurance offers unusual temptations and opportunities to the fraudulently disposed. In-

surance rings and insurance rackets are by no means unknown. The number of these individual and concerted assaults on the accumulated savings of millions of honest and provident citizens require the abandonment of means which make them possible and profitable. The prestige of the courts and respect for law generally is not advanced by their being used as the unknowing means of gaining dishonest ends.

The movement in the field of insurance law towards the establishment of a common law relationship of insurer and insured, has resulted then in the infusion of three unsound elements into the law. First, it has tended towards the enlargement of insurance contracts beyond the risk paid for by the premium which is patently bad; secondly, it has tended towards the injection of uncertainty into a branch of the law governing an institution which requires certainty and predictability; and thirdly, it has increased the opportunities for successful fraud against an institution whose nature presents unusual temptations.

Prior to the time of Lord Mansfield, those engaged in commercial pursuits were distrustful of the common law and the common law courts as means for the just disposition of their controversies. The law was out of harmony with the requirements of the commercial world. This distrust is again being voiced by the press, and it reflects a widespread feeling on the part of thoughtful laymen that the law is once more out of harmony with their legitimate requirements. The wisdom of Lord Mansfield in deciding disputes concerning commercial undertakings on the legitimate necessities of the business involved, greatly enhanced the prestige of the common law courts and made the law an active agency in the advancement of the general welfare. This illustrates the common law system at its best, the fostering of legitimate and necessary undertakings. Viewing the law of today and the institution of insurance as it exists today, there is no escaping the conclusion that the trend in the law should be towards a determination of insurance controversies on principles of law which are in strict accord with the insurance contracts and the necessities of the institution of insurance. The statutory law control and the institution itself have long since eliminated the necessity of any common law control. The law, statutory as well as common, must abandon means which, while they may be very efficient agencies of justice

in other departments of the law, have shown themselves to be presently detrimental to the ends of justice in the law of insurance. The law must recognize the long term necessities of an institution whose objectives are in accord with the common good and enforce insurance contracts with that end in view. Otherwise the common law of insurance will sink into a welter of decisions decided on immediate principles. It should be the aim of the common law of insurance, as it is the aim of the common law system, to move towards the attainment of principles which serve the ultimate ends of justice and not the immediate ends of the few who have much to gain by the disposition of particular controversies.

V.

It is quite futile, of course, simply to point out that the courts should not substitute their ideas of justice for the terms of insurance contracts; or wherein they are transgressing their powers; or that they should not think in terms of a common law relationship of insurer and insured which they can control. The effective thing is to understand clearly what is going on so that corrective efforts can be directed along the line holding the greatest promise of success.

In cases presented to the courts insurers should, if their influence is to be felt, recognize the trend towards the establishment of something closely resembling a common law relationship of insurer and insured, and attempt to direct it by pointing out that their position is in accordance with the true purpose and aim of the common law. This does not mean an abandonment of the right to stand on the plain terms of a lawful contract, but the presentation of the additional point that the conclusion which the insurer seeks is fair and equitable in the true common law sense—an argument used to the utmost in non-contract suits arising out of legal relationships. This argument, which is largely *ad hominem*, has been used against insurers when it should have been used by them in helping the courts to avoid the sacrificing of ultimate justice for an immediate emotional appeal clothed as justice. True, there are cases in which the courts cannot escape deciding for the insurer on points of law, even though they may be disposed to decide otherwise, but such is not the average contract case. An institution as economically and socially necessary as insurance can lay great claims on the common

law; in fact, the common law system is particularly well adapted to the promotion of highly desirable undertakings having wide social and economic implications. The common law is very susceptible to direction by litigants who can make a strong appeal to reason. Insurers, to control the present trend, should present their cases not only on principles of established law, but also on facts and arguments which will influence the courts to decide on sound insurance principles. They must make the courts see that in the common law of insurance, real justice lies not in a multitude of vague inscrutable individual notions of justice varying from court to court but in a settled policy to enforce insurance contracts as written.

No insurer knowingly defends a claim which comes within its contract, but they are not always on the alert to prove that such is really the case, and to show what the institution requires of the law and has an undeniable right to require, so that it may operate on sound insurance principles. Once one fully understands just what the law of insurance really is, how it operates and why, then the necessity of directing the existing trend by presenting cases from a relational approach as well as from a contract approach becomes apparent.

One simple example will illustrate what can be done by the common law method in shaping the contract law of insurance. This example has been taken because in its strictly contractual aspects the defense presents a hard case devoid of equity. A life insurer issued an industrial life insurance contract which provided that it should be void if there was already in force on the life of the insured a policy issued by the insurer, unless the prior policy was disclosed. The insurer was sued on this contract, and it proved as its defense the existence of a prior policy which had not been disclosed by the insured. It also proved that it did not keep a record of its policyholders by name, and that it did not know that two contracts had been issued to the same person until after his death. That was the extent of its proof. When the case came before the supreme court of an eastern state, it decided against the insurer in a rather caustic opinion. The court said that if the insurer kept its records in such a negligent manner that it did not know the names of its own policyholders and then issued additional contracts to them, it would be unjust to permit it to set up this defense. Accordingly, the

insurer was estopped from doing so. Although the contract expressly provided that it should be void if there was a prior undisclosed policy on the same person, and admittedly there was such a policy, the court decided that the contract was not void. Consequently, under the law of that state, as expressed in that decision, such policy provisions became ineffectual.

About fifteen years later, another case involving the same kind of policy and containing substantially the same provision came before the same court. In this case, the insurer also proved that it kept its records only by number and had no knowledge, prior to death, of the duplication. But it also proved the large number of policies it issued, the great expense it would entail to keep its records by name, and how this expense would of necessity increase the cost of this type of insurance, which is issued almost entirely to persons of modest means. It proved that even if it kept a record of its policyholders by name it would be of little value because of the large number of applicants having foreign names which are spelled variously, or changed, and because of the great number of names changed by marriage. The insurer proved that the premiums on such policies had to be collected by agents grouped by territories and that the only record of the collection of these premiums was the entry in a little book which the policyholder had; that there was no way the company could check so as to prevent the issuing of more than one policy to the same person without making the cost of the insurance prohibitive to those who need it. The insurer went on to prove that the reason for the provision was not to avoid a liability it would have knowingly assumed, but simply to prevent the use of its policies for the vicious and unlawful purpose of speculating on human lives. The court on this showing reversed itself and decided in favor of the insurer, pointing out that the insurer was justified in maintaining its records as it did, and that the clause was shown to be a perfectly fair and reasonable provision and should be enforced as written. This will illustrate how cases which appear to be pure contract controversies are often, in reality, decided in the common law method, and the resulting law, though contract law, is not the outgrowth of contract. In a realization of how the common law of insurance is developed lies the insurer's opportunity for a real service to the institution of insurance and the law itself.

VI.

The contract element and the statutory law element in the insurer-insured situation have somewhat obscured the part which the common law element plays. For that reason the common law has been singled out for examination. A further reason is to disclose the extent to which judicial conceptions of justice influence the development of what appears to be pure contract law. That these conceptions of justice as they concern the institution of insurance may often be profoundly mistaken no one will deny. The remedy lies not only in the efforts of the insurance bar to educate and guide the courts by the intelligent handling of litigation, but in clarifying by general education, the commonly accepted views of what constitutes real justice between insurer and insured.

The ultimate determination of the actual liability assumed by an insurer in issuing an insurance contract is determined by three elements; the contract itself, the statutory law of insurance, and the common law of insurance exerting its influence in the nature of the control which it has over common law relationships. Only by closely following the trend of the law as recorded in the unending stream of judicial decisions can one fully appreciate the intricate and subtle interplay of these elements in shaping the law. There has been no desire to emphasize the importance of the common law element as against the other elements, but rather to examine one aspect of the law of insurance which has not always been fully appreciated.

A glance at history has shown how the form of society in which the common law had its beginnings gave it its central conception, the idea of legal relationships controlled by judges governed by custom and their conceptions of justice. It has shown the rise of the law of contracts and later the reassertion of the common law conception of legal relationships, in the statutory law of insurance by legislatively prescribed contract terms, and in the field of the common law of insurance by the use of procedural technique to get situations which are subject to judicial control. Lastly, it has indicated the very practical wisdom of clearly understanding just why the law of insurance is what it is, why the courts apply it as they do, and what can be done toward directing the law along sound and beneficial lines.

N. B.—It has been assumed throughout this article that the reader understands that the

law in the United States is the law of fifty separate jurisdictions, namely the law of the forty-eight states, the District of Columbia and the Federal law. It has also been assumed that the reader understands there are a great many kinds of insurance contracts. Consequently, a statement which is true with respect to one type of contract or with respect to the law in one jurisdiction may be entirely wrong as to another. Such being the case generalizations cannot always be of universal application, and if one attempted in such a paper

as this to state all of the exceptions to his generalizations he would end up in a maze of meaningless particulars.—J. H. C.

EDITOR'S NOTE: The author is a Member of the Nebraska, South Dakota and New York Bars; a Member of the Standing Committee on Life Insurance Law of the International Association of Insurance Counsel; he was formerly Chief Attorney, Case Review Section, Bureau of War Risk Insurance; and for the past seven years has been a Member of the litigation staff of the General Counsel of the Metropolitan Life Insurance Company.

The Effect of the Presumption Against Suicide Upon the Burden of Proof in Life and Accident Cases

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THE subject of my paper is a rather broad one, and it has probably caused more discussion than any other question in the law of insurance. It is my purpose to discuss the question of upon whom the burden of proof rests in suits brought upon accident policies and upon double indemnity provisions of life policies, when the issue involves suicide. I am going to attempt to show how the courts have allowed the use of the presumption against suicide to lead them to make strange decisions; and to show how, in most instances, the courts have allowed this presumption to place burdens upon insurance companies in defending this type of cases that should not, as a matter of law, be placed upon them.

We can start with the major premise that all courts practically unanimously recognize that in suits on accident policies and the double indemnity provisions of life policies, the burden of proof is upon the plaintiff or beneficiary to show that the injury or death was due to accident. I can find no case where this rule is not theoretically recognized by the court. *Corpus Juris*, Vol. 33, Sec. 824, accepts it as a matter of course. Cooley, in his *Briefs on Insurance*, Vol. 6, page 5283, says, as if there were no doubt about it:

"The burden of proof is, of course, on the plaintiff to show that the death or injury of the insured was accidental."

Before going further it is necessary to discuss what is meant by "burden of proof." Wigmore, in his *Second Edition on Evidence*,

Section 2485, says that the burden of proof is used in two senses: first, in the "risk of non-persuasion of the jury"; and secondly, in "the duty of producing evidence to the Judge." Burden of proof in the first sense means that the party upon whom it is cast has the duty of affirmatively proving his case and by a preponderance of the evidence; that if the evidence is equally divided, or if there is doubt in the minds of the Judge or the jury (whichever is deciding the case), then that party loses. Burden of going forward with the evidence is the duty of introducing evidence to meet or overcome a prima facie case which has been made by the other party. It is the duty of offering evidence so that in a jury trial there will be sufficient evidence to take the case to the jury.

It is, therefore, at all times necessary to distinguish the burden of proof in this sense from the burden of going forward with the evidence, or the burden of introducing evidence to meet a prima facie case. Courts have confused these two principles, and it is necessary to distinguish between them in order to arrive at the proper legal result. The burden of proof hereafter in this paper will mean the risk of non-persuasion. When it is meant in the other sense, I will term the burden of going forward with the evidence.

Naturally, it is very important to determine upon whom the burden of proof is cast in any case, as that party (as we have previously said), has the affirmative, and must convince the Judge or jury in order to win. This burden is placed upon a party after issue

is joined, and is determined from the pleadings. According to every authority which has given the matter consideration, the burden of proof never shifts. It is determined before the trial, and no evidence of any nature or kind, offered at any time during the trial, can cause the burden of proof to shift from the party upon whom it has been cast. Jones, in his "Law of Evidence," says:

"As a matter of fact, the burden of proof in any case is determined by the issues, and it does not shift, but at the end the party upon whom the burden rests by the pleading must have sustained his proposition by a preponderance of the evidence."

Wigmore, in Section 2489, says:

"The first burden above described—the risk of non-persuasion of the jury—never shifts since no fixed rule of law can be said to shift. The law of pleading, or, within the stage of a given pleading, some further rule of practice, fixes before hand the issueable facts respectively apportioned to the case of each party; each party may know beforehand, from these rules, what facts will be a part of his case, so far as concerns ultimate risk of non-persuasion. He will know from these rules that such facts, whenever the time comes, will be his to prove, and not the other party's; and that they will not be sometimes his and sometimes the other's, or possibly his and possibly the other's."

However, the burden of going forward with the evidence differs in that it does shift. Whenever one litigant has made out a prima facie case, the burden of offering testimony so as to meet the prima facie case shifts to the other litigant. The burden of going forward with the evidence can, therefore, be shifted either by evidence making out a prima facie case, or by the help of any presumption of law.

Wigmore, again in Section 2489, says:

"The second kind of burden, however—the duty of producing evidence to satisfy the Judge—does have this characteristic referred to as a shifting."

This, I believe, sufficiently explains the difference between "burden of proof," and "burden of going forward with the evidence" to

allow us to see what is the effect, upon the two burdens, of a presumption.

There can be no doubt that the burden of proof in its first meaning, that is, the risk of non-persuasion, is not shifted and should not be shifted by a presumption. The burden of proof in the second sense, or the burden of going forward with the evidence, is shifted by a presumption, and that is the real purpose of creating presumptions. Again quoting from Wigmore, Section 2487:

"The term 'presumption' is attended by much confused usage. The particular ambiguity which we need here to guard against is the confusion between the inference itself—that is, the propriety of making the inference from the evidence to the 'factum probandum,'—and the effect of the inference in the hands of the Judge. So far as 'presumption' means anything for the present purpose, it signifies a ruling as to the duty of producing evidence. 'The essential character and operations of presumptions, so far as the law of evidence is concerned, is in all cases the same, whether they be called by one name or the other; that is to say, they throw upon the party against whom they work the duty of going forward with the evidence; and this operation is all their effect, regarded merely in their character as presumptions.' Keeping in mind, then, that a presumption signifies a ruling of law, and that to this extent the matter is in the Judge's hands and not the jury's, what is the effect upon the legal situation of the opponent? * * * He is precisely where the proponent was in the first place when he fulfilled the duty, then his, of producing evidence, and succeeded in getting from the Judge to the jury. The case is now open again as to that specific issue, that is, free from any liability to a ruling of law against either side, and is before the jury where the original proponent has the burden of proof in the sense of the risk of non-persuasion of the jury. The important thing is that there is now no longer in force any ruling of law by the Judge requiring the jury to find according to the presumption. * * * The main point to observe is that the rule of presumption has vanished because its function was as a legal rule to settle the matter only provisionally and to cast upon the opponent the duty of producing evidence, and this duty and this legal rule he has satisfied."

In Section 2490, he says:

"Nevertheless it must be kept in mind that the peculiar effect of a presumption 'of law,' (that is, the real presumption), is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule; * * *

"It is therefore a fallacy to attribute (as do some Judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary."

We find the following statement in Couch's *Cyclopedia of Insurance Law*, Vol. 8, Sec. 2231:

"In jurisdictions where a distinction is drawn between accident policies, wherein the plaintiff has the burden of bringing his case within the terms of the policy by affirmatively showing accidental death, or death by accidental means, and ordinary life insurance policies, where liability follows a showing of death unless there is an affirmative showing that it was within an exception, such as suicide, for instance, the plaintiff in an action on an accident policy has the burden of proving the accidental nature of insured's death, to do which suicide must be negatived; and this notwithstanding the presumption against suicide, since such presumption, it has been said, does not change the burden of proof in the first instance. In fact, the presumption against suicide is rebuttable, and as such is not evidence, but a rule of law which operates merely to throw upon the party against whom it is raised the duty of going forward with the evidence, and does not relieve the plaintiff of the burden of proving death by accident."

This rule of law has been theoretically accepted by most courts, and has been very strikingly expressed by many judges. One of the most striking phrases is that of Lamb, J., in the case of *Mockowik v. Kansas City Rrd. Co.*, 196 Mo. 550, where he said:

"'Presumptions', as happily stated by a scholarly counsellor, *ore tenus*, in another case, 'may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual fact.'"

or, as paraphrased by Judge Faris, in the case of *Brunswick v. Standard Accident Insurance Company*, 278 Mo., 154, 173:

"Presumptions are the bats of the law which the light of evidence frightens and causes to fly away."

In the case of *Moore vs. Ryan*, 188 Indiana, 345, the Court said:

"Presumption fails upon the introduction of *some* evidence and the case is then tried as though no presumption ever existed." (Note the use of the word "some".)

We believe that any court, discussing the question of burden of proof and the effect of presumptions, theoretically will accept the above statements as being undoubtedly correct.

It can be seen that if the burden of proving accident is upon the plaintiff, which naturally carries with it the burden of proving that death was not due to suicide, as suicide is not an accident, the insurance company has an advantage which it would not have if it had to prove suicide. If the jury is doubtful as to whether it is suicide or accident, the plaintiff in the first instances loses, whereas in the second instance, the company would lose. Further, in determining whether a verdict should be directed, the question of who has the burden of proof is a determining factor with the court. It is, therefore, very important to ascertain whether or not the courts really place the burden as a matter of fact upon the plaintiff or whether they, when applying the rules to the facts, allow the burden, contrary to all theory, to shift to the defendant.

It is my contention that in most instances, the courts give nothing more than lip service to the rule that the burden of proof is on the plaintiff to show that the death of the insured was accidental. That, as a matter of practice, the result is that, instead of the plaintiff carrying this burden, the defendant actually carries the burden of proving suicide. The court, after the plaintiff has made out a *prima facie* case, shifts the burden of

proof to the defendant, rather than just the burden of going forward with the evidence, being misled into error by the presumption against suicide. If, as I have said, the burden of going forward with the evidence only was shifted, the insurance company would only have to introduce sufficient evidence to meet the prima facie case; and if there was any doubt as between accident and suicide after the company had offered its evidence, the plaintiff would lose. But if the court erroneously shifts the burden of proof to the insurance company, placing upon it this risk of non-persuasion, then there being a doubt, the insurance company would lose.

The next step in this paper is to discuss the decisions of the courts to see whether or not the contention above set forth is true, and to determine just what the courts really do in this type of case. A reading of the cases, I believe, will confirm my opinion that the majority of courts readily accept the correct theory of law, but that very few, as an actual fact, properly apply the rule. In fact, the cases can be divided into four classes, or groups, according to the effect which is given to the presumption against suicide by the court.

There is, first, a class of cases which apply the theoretical rule correctly. These cases hold that the burden of proof is upon the plaintiff throughout the whole case to prove accident, and use the presumption against suicide only to shift the burden of producing evidence. They give no evidentiary value whatsoever to the presumption, allowing it to be of no aid to the plaintiff in showing that the death was due to accident, and not suicide.

There are, next, a large and vast number of cases which give lip service to the theoretical rule enunciated above, but, as a matter of fact, allow the presumption against suicide not only to shift the burden of producing evidence, but also to shift the burden of proof to the defendant. The burden of proof in these cases, although stated by the court to be upon the plaintiff, actually falls on the defendant when the rule is applied to the facts.

There is a third class of cases, where the court openly says that the presumption against suicide shifts the burden of proof to the defendant (who then has to prove suicide by a preponderance of the evidence), but admitting at the same time that this is not the correct rule of law.

Then, there is a small class in which the courts not only shift the burden of proof to

the company, requiring affirmative proof of suicide, but go further and use the presumption to increase the degree and amount of proof required.

The last two classes of cases, therefore, place the burden upon the insurance company to affirmatively prove suicide, regardless of whether the suit is upon an ordinary life policy or upon an accident policy. There is no distinction drawn between the two types of policies.

I will now give you what I consider the most striking examples of each of the above classes to illustrate what I mean; and will also show into what classes some of the more important jurisdictions fall.

The best example of a correct application of the presumption against suicide, is the Pennsylvania case of *Watkins v. Prudential Insurance Company of America*, 173 Atlantic, 644. This was a suit to recover the double indemnity under a life policy. The insured came to his death as a result of carbon monoxide gas poisoning, and upon a verdict being rendered for the plaintiff, the defendant appealed, and alleged error in the following charge of the lower court:

"This presumption (against suicide) has the same probative force and effect as direct evidence of accidental death. Unless the jury find that the evidence of defendant outweighs the presumption that Norman C. Watkins did not commit suicide, the verdict must be for the plaintiff."

The court, in reversing the lower court, said:

"The Court erred in giving to the so-called presumption against suicide the weight of a probative fact, thereby casting upon the defendant the burden of proving that the insured's death was something other than the kind of death insured against. Considerable confusion appears in judicial opinions as to the nature of presumptions and their function in the administration of justice. They are not evidence and should not be substituted for evidence. * * *"

Again:

"As they deliberated in this case, the jurors had the right to bear in mind the fact that to the average human being, life

is more attractive than death. They were thus entitled to consider, on an even balance of the evidence as between accidental death and suicide, the probabilities against suicide, but the Court below erred in its interpretation and application of the so-called 'presumption against suicide.' The Court gave to the ordinary probability that a human being will not commit suicide the force of a fact in evidence, shifting the burden of proof to the defendant. * * In judicial trials, as in the other affairs of life, probabilities are always being weighed by those who have to decide questions of fact, but probabilities are not legal presumptions. That a witness who has an interest in the outcome of a lawsuit will 'color his testimony' accordingly, is a probability which jurors have a right to consider, but it is not a presumption. Any fabrication of testimony gives rise to a permissible inference by the jury of the lack of credibility of the entire testimony of the fabricator, but this legitimate inference does not amount to a legal presumption that his entire testimony is false. In the instant case the general probability against suicide did not shift the burden of producing evidence upon the party against whom it operated. Here the burden of proving that the death of the insured was caused through 'external, violent and accidental means' was squarely placed on the plaintiff. Under the contract of insurance, she, in order to make out a cause of action, had to incorporate in her statement these averments; * *. What the trial judge aptly called the 'necessary element of accidental death' was not 'supplied by the presumption against suicide.' No presumptions ever take the place of proof. The so-called 'presumption against suicide' is merely an inference or an argument, it is not what Justice Agnew, in the opinion above cited, properly designates as a 'legal presumption binding on the jury, *prima facie*, until disproved.' "

The Court then finally says:

"On plaintiff rests the burden of proving all the operative facts by a fair preponderance of the evidence. An even balancing of the evidence on the issue of death by accidental means or death by suicide denotes that plaintiff fails to sustain her burden of proof and the verdict should be for the defendant."

The Court of Appeals for Kentucky, in the case of *Massachusetts Mutual Life Insurance Co. vs. Bush*, 33 S. W. Rep. (2), 351,

refused to even allow the court to charge the jury in regard to the presumption against suicide after the defendant had offered some evidence of suicide. It says:

"Instruction three were these words: 'The presumption of law and the presumption of fact are against suicide.' This instruction should not have been given. It was simply a question for the jury on all the evidence whether the death of the deceased was by accident or intentional suicide. The real issue in the case was whether the deceased shot himself accidentally or intentionally. There was no presumption that he shot himself accidentally. The burden was upon the plaintiff to make out her case."

One of the best discussions of this subject is found in *Grosvenor vs. Fidelity & Casualty Co.*, of New York, 168 N. W. 596,

decided by the Supreme Court of Nebraska. The Court there said:

"Because men love life and fear death, they instinctively avoid obvious danger. This fact, drawn from experience, is the basis of a presumption, relied upon by plaintiff, that when the cause or manner of death is unknown we infer that it was not suicidal. The inference is not based upon a law of nature which is invariable. Men do frequently commit suicide. It is one of a multitude of legitimate inferences, in which we infer the unknown, from the known, having greater or less degrees of probabilities, which we use in reasoning to arrive at the ultimate fact. Being a probability resting upon human experience, in its nature, it is controlling only in the absence of evidence of the actual."

Other jurisdictions which fall in this classification are New York, Maryland, New Jersey, Missouri, and Indiana.

The majority of the cases in the Federal courts do not come within this group. The only circuits that seem to do so are the second and tenth. I can find only one case on the

question, decided by the Court of Appeals for the second circuit,

Messervy vs. Standard Accident Insurance Company of Detroit, Michigan, 58 Fed. Rep. (2), 186.

In this case the court holds that in the absence of evidence, the presumption exists that insured's death was caused by accidental means, rather than by suicide. The court does not give to the presumption any evidentiary weight.

The Circuit Court of Appeals for the Tenth Circuit, in the case of

Frankel vs. New York Life Insurance Company, 51 Fed. (2) 933,

clearly held that the presumption disappears when there is evidence of suicide, saying:

"The presumption is one of law. It is indulged because self-destruction is 'contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person'; and a party is entitled to the benefit of the presumption in the absence of evidence respecting the cause of the death. But the plaintiff had the burden of proving the fact necessary to establish the liability of the insurance company, and the legal presumption that might aid her could be of value only under circumstances leaving the cause of death in doubt. As was aptly said in *Von Crome vs. Travelers Insurance Company*, 11 Fed. (2), 350, 'the legal presumption disappears when there is evidence of suicide.' In this case there was an ample showing of enlightening circumstances on the subject."

The theory of this case is corroborated by the case of *Wirthlin vs. Mutual Life Insurance Company of New York*, 56 Fed. (2),

where, at page 137, the court said:

"It is true there is a presumption against suicide but it is one of law and it disappears when circumstances are adduced showing how the death occurred, and in that case the beneficiary is bound to establish that the death was accidental."

In my opinion the best example of the second-class is the case of:

Mutual Life Insurance Company of New York vs. Hatton, 17 Fed. (2) 889.

This is a decision of the eighth circuit. The court first held that under the terms of an accident policy, the burden was on the plaintiff to show, in order to recover, that the decedent shot himself accidentally. The court even cites with approval the statement of Judge Faris, that "presumptions are the bats of law which the light of evidence frightens and causes to fly away"; and seems to intimate that there is no doubt in its mind but that the presumption does not shift the burden of proof, but only the burden of going forward with the evidence. But then, astonishingly, we find this language in the decision:

"Where the evidence shows that the insured was killed by external and violent means, *there is a presumption also, when the evidence is doubtful, as to whether death was due to an accident, or to suicide, that it was caused by accident.* The presumption against suicide is a rebuttable one, and is to be weighed with all other facts and circumstances in evidence."

Again, in the case of:

New York Life Insurance Co. vs. Anderson, 66 Fed. Rep. (2), 705,

the eighth circuit held that where the evidence is reasonably consistent with the hypothesis that death was not suicidal, the presumption against suicide may prevail, saying:

"The plaintiff laid her cause of action squarely on the double indemnity provisions of the policy which provide for a recovery in case of accidental death. The defendant's answer sets up a general denial and also the affirmative defense that the cause of death was suicide occurring within two years from the date of issuance of the policy, and that under its express terms and this situation the plaintiff could only recover the premiums paid on the policy with interest. These were the only questions at issue.

The answer to the question then as to who might prevail in the event the evidence was in equipoise must be determined by answering the question upon whom was the burden of proof.

It is well settled that, in a case on an accident policy in which there is a general

denial and an affirmative defense of suicide, the burden of proof is upon the plaintiff to show from all the evidence that the death of the insured was caused by external, violent, and accidental means.

If there were facts and circumstances that indicated the death was accidental, this, aided by the presumption against self-destruction, would entitle the plaintiff to recover, unless the defendant by a preponderance of the evidence establishes its affirmative defense. If defendant was not able to meet this burden, the law would be with the plaintiff, and she would be entitled to the double indemnity.

Yet, prior to these two decisions in the eighth circuit, we find the decision of:

Von Crome vs. Travelers Insurance Company, 11 Fed. Rep. (2 S), 350,

in which Judge Faris, (about whom we have so often spoken), was the organ of the court. The suit was brought to recover on the double indemnity provisions of a policy of life insurance, and there was a verdict for the defendant. The upper court affirmed the decision, saying:

"Touching the contention of plaintiff that it was here and always is the duty of the court to charge the jury that a presumption of law existed against the fact of suicide, it is enough to say of the contention that this is sometimes true and sometimes not true. * * In this particular case, since there was evidence, from what the insured said as to his intent to kill himself, and from the circumstances, evidence that he had killed himself, the presumption against suicide as a matter of law disappeared from the case. There was no longer any reason, to invoke any presumption of law about the matter. * *

The true doctrine, as still held by the Supreme Court of Missouri, is found in the Brunswick case, *supra*, which was reversed, however, because the court nisi charged the jury that no such presumption existed. This was error in that case, but only because defendant insurance company had therein offered no evidence whatever, and the evidence offered by the plaintiff was, in view of the rule theretofore announced in *Reynolds vs. Casualty Co.*, 201 S. W., 1128, 274 Mo., 831, just as consistent with ac-

cident as it was with suicide. The contention of plaintiff in the last analysis is that she may deduce, from the facts and circumstances shown in proof, a presumption against death by suicide, and thereafter, regardless of the state of the proof of suicide, she may again add such presumption to her side of the case. This is not the law."

How can the former two cases possibly be reconciled with the language of this case, which clearly falls within our first classification?

The decisions of the Court of Appeals for the fifth circuit come squarely within this class. It is a peculiar thing that there are more reported cases passing upon this point in the fifth circuit than in all the other circuits combined.

We find the court saying, in the case of:

New York Life Insurance Company vs. Trimble, 69 Fed. (2) 849:

"Whether he fired the pistol intentionally and so committed suicide, or unintentionally and therefore accidentally, is the only question in the case. Suicide will not be presumed from the mere fact of violent death and the reasonable inference of accident therefore arose upon proof of death without any additional evidence but the presumption against suicide was overcome if the preponderance of evidence was consistent with the theory of suicide and at the same time was inconsistent with any reasonable hypothesis of death by accident."

Most certainly this is placing the burden of proof upon the defendant to prove suicide, although the suit was on the double indemnity feature of a life policy, and although the court said that the burden of proof was upon the plaintiff.

Again, in a very recent case,

Travelers Insurance Co. vs. Wilkes, 76 Fed. (2) 701,

the court, after stating very ably that the burden of proof was upon the plaintiff, and after saying that the lower court was in error in charging the jury that the burden of estab-

lishing suicide by a preponderance of the evidence, was upon the defendant, then says:

"It is only after the evidence is in that the presumption against suicide may come into play to help the plaintiff bear the burden. It does not regulate nor change the burden of proof, but it is an evidentiary presumption which may aid a lack of evidence but cannot prevail against evidence. Where the evidence makes it proper a jury may be instructed how to use this presumption, but it ought not to be confused with the burden of proof under the pleadings."

In the case of:

New York Life Insurance Company vs. Bradshaw, 2 Fed. (2) 457,

the court said that

"The presumption against suicide is rebuttable and cannot prevail except in the absence of evidence as to cause of death or *where the evidence is conflicting.*"

In the case of:

Love vs. New York Life Insurance Company, 64 Fed. Rep. (2), 829,

the same court held that in an action on the double indemnity clause of a life policy, where the insured's death was either suicidal or accidental, presumption against suicide was overcome if preponderance of evidence was consistent with suicide and inconsistent with any reasonable hypothesis of accidental death.

This court has said over and over again that the presumption against suicide has to be overcome by a preponderance of the evidence.

In an appendix I have grouped all the cases on the question in the fifth circuit, as they make very interesting reading, and show clearly that the court, while attempting to follow the correct rule, actually fails to do so.

The seventh circuit and the ninth circuit are very similar to the fifth circuit, although in my opinion they do not attempt to follow the correct rule as much as the fifth does. We find, for instance, the seventh circuit, in the case of:

Ocean Accident and Guaranty Corporation vs. Schachner, 70 Fed Rep. (2 S) 28,

holding that an instruction in a suit on an accident policy, that the insured's death was presumed accidental and not intentionally self-inflicted if there was no preponderance of evidence as to the cause of the injury, a correct charge and not misleading. The court said:

"Where death is caused wholly by an outside violent cause it has been adjudicated that, as between the theories of accident and suicide as the cause, the former will be presumed if a preponderance of the evidence does not sustain the latter."

The same court, in:

Metropolitan Life Insurance Company vs. Hogan, 63 Fed. Rep. (2 S) 654,

in discussing this question, said:

"The presumption is that death was not self-inflicted. That presumption, together with the pertinent circumstances surrounding the death, presented a question of fact which was properly submitted to the jury."

The leading case in the ninth circuit upon this question is

U. S. Fidelity and Guaranty Co. vs. Blum, 270 Fed., 947.

The court in this case starts off as if it were going to follow the correct rule, saying:

"There is a presumption that death was not suicidal. This is disputable, but to overcome it there must be proof of a tendency to establish the facts sufficient for the jury's consideration. * * * So we get back to the burden that plaintiff must sustain, which is to show that death came through accidental means."

But then we find this language:

"The fact, namely, the proof of accident, is susceptible of proof as any other given fact, and it may properly be deducible by inference and presumptions from facts proven."

The court also says that the plaintiff can be aided in its proof through the presumption against suicide.

In the case of:

Metropolitan Life Insurance Company
vs. Broyer, 20 Fed. (2) 818,

the court says that the "presumption is that Broyer did not commit suicide, and we cannot say the jury erred in concluding that the presumption was not rebutted." This, of course, was a suit on an accident policy.

And, finally, in the case of:

Wells Fargo Bank and Union Trust Company vs. Mutual Life Insurance Company of New York, 8 Fed. Supp., 916,

we find the District Judge stating in no uncertain terms that the rule of the Ninth circuit is that the burden is actually upon the defendant to show that the insured committed suicide, by a preponderance of the evidence.

Many of the states fall within this class. For instance, the Illinois Supreme Court, in:

Fidelity & Casualty Company of New York vs. Weise, 55 N. E., 540,

after holding that the burden in an accident policy on the issue of suicide is on the plaintiff to show that the insured did not commit suicide, and that such burden is not shifted by the presumption against suicide, said:

"The plaintiff is entitled to the presumption that the insured did not take his own life. The presumption was not conclusive, but rebuttable. The question to be determined by the jury, from the consideration of all the evidence (the plaintiff being given the benefit of the presumption referred to), was at the close of the testimony, as it was at the beginning, did the insured come to his death through accidental means."

This was followed in the case of:

Wilkinson vs. Aetna Life Insurance Company, 88 N. E., 550.

In a like manner, the Supreme Court of Michigan, in:

Powers vs. Loyal Protective Insurance Company, 253 N. W., 250,

said that as no one could positively say from the testimony as to what happened imme-

diately prior to the asphyxiation of the insured, that the "presumption against suicide is a pertinent fact in the case which was properly submitted to the jury."

California very clearly falls into this category, with the case of:

Wilkinson vs. Standard Accident Insurance Co., 180 Pac., 607,

the court saying that the following instruction is correct:

"Where the insured is found dead under such circumstances that death may have been due to accident or to suicide, the presumption is against suicide and in favor of accident."

The court then also says that presumption did not operate to shift the burden of proof as to the cause of the death, from the plaintiff to the defendant. It seems to me that these two statements on their face are inconsistent.

Although the Alabama Supreme Court holds that the burden of proof is upon the plaintiff to prove accident, and that a blanket charge that if the evidence is in equipoise as between accident and suicide the defendant loses,

New York Life Insurance Company vs. Jenkins, 158 So., 309,

Protective Life Insurance Company vs. Swink, 132 So., 728,

yet the court gives to the presumption against suicide the effect of evidence,

Protective Life Insurance Company vs. Swink, *supra*,

Mutual Life Insurance Co. of New York vs. Maddox, 221 Ala., 292; 128 So., 383.

Other jurisdictions falling into this category are Massachusetts, Mississippi, Minnesota, and Arizona.

In the third class is the case of:

Selover vs. Aetna Life Insurance Company, 38 Pac. Rep. 2d, 1059, 54 Insurance Law Journal, 1054.

In this case the question was clearly put up to the Court, the respondent contending that the burden of proof lay upon the appel-

lant throughout the case to show that the death was accidental. Appellant contended that since the only question was whether the death was accidental or was the result of suicide, and the appellant having made a prima facie case of accidental death, the burden was upon the respondent to establish suicide. The Court then taking cognizance of the fact that in *Couch's Encyclopedia of Insurance Law*, the burden of proving death by accident is always upon the plaintiff, says:

"We turn then to our own decisions for guidance. The question, in principal, seems to have risen long ago and to have been definitely settled without deviation. If the matter, therefore, is one of *stare decisis*, it can make little difference what other courts may have decided, or even whether better logic is to the contrary. * *"

"* * * The law of Washington is well settled that, the presumption against suicide having once attached, it remains in the case until overcome by evidence to the contrary, and that the burden of overcoming the presumption is upon the insurance company. * * *"

I wish to impress upon you that this case was brought upon an accident policy insuring against loss resulting directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means.

Another, and probably the most impressive example of this class, is the famous case of *New York Life Insurance Company vs. Ross*, 30 Fed., (2d), 80, decided by the sixth circuit.

This case held that a charge by the trial judge "that where this presumption of accidental death is brought into play, and is given effect by the jury, the burden of proof shifts to the defendant, and it is made incumbent upon the defendant to establish by a preponderance of evidence that the deceased lost his life as a result of self-destruction; and that the presumption of accident stands as proof until it is overcome by evidence to the contrary," was a correct charge. Under this charge, the burden of proof (to prove suicide) is clearly upon the company, and in speaking of this charge, the court said:

"As I have stated, this is contrary to the well established doctrines of presumption

and burden of proof, and can be justified, if at all, by a consideration of decisions binding upon the court below upon this precise question."

Judge Dennison in a concurring opinion, said:

"I concur in thinking that the lower court was, and this court is, bound by the *McConkey* case, and hence that there was no error."

I respectfully suggest that every lawyer who is trying an accident case involving suicide should read this concurring opinion, and I only wish that I had the time to quote it in detail.

The other leading case in the sixth circuit is the case of:

Standard Life & Accident Insurance Company vs. Thornton, 100 Fed., 582.

In this case, the court squarely held that in an action on an accident policy which excludes liability for death by suicide, the burden rests upon the defendant to establish the defense of suicide by a preponderance of the evidence.

To illustrate our last type of case, we are going to use the case of:

Michel vs. London & Lancashire Indemnity Company, 162 La., 159.

In this case, (which is a suit upon an accident policy insuring against bodily injuries effected directly and independently of all other causes, through accidental means) the court held that the burden of proof was on the plaintiff to show that the death was external and violent. Then it said:

"The rule of jurisprudence is so well established in this state as not to require citation of authority, to the effect that there is a strong legal presumption against commission of suicide, and the insurance company alleging such defense must establish it to the exclusion of every other reasonable hypothesis. * *"

It is to be remembered that in Louisiana the court sits without a jury, and it is not a question of whether or not the case shall go to the jury, but solely a question as to how

the court should decide the case. In other words, the court allows the presumption not only to shift the burden of going forward with the evidence, but requires the insurance company, even under an accident policy, to establish it beyond a reasonable doubt.

Another accident case in Louisiana, which follows this rule, is:

Faulk vs. Mutual Life Insurance Company, 160 La., 529.

Courts, realizing that people do commit suicide frequently, and that in many instances they have given too much weight to the presumption against suicide, have developed means of overcoming the presumption. One of the means is the use of any suicide note. For instance, in Louisiana, in the case of:

Webster vs. New York Life Insurance Company, 160 La., 854,

the court says very distinctly that a suicide note will overcome the presumption against suicide. We find the fifth circuit, in the case of:

Pilot Life Insurance Company vs. Wise, 61 Fed. (2) 481,

stating that the presumption against suicide is neutralized by letters found on insured's body, indicating an intention to destroy his own life.

Another means of overcoming the presumption, which has been used very successfully in suicide cases, is the use of proofs of death. The United States Supreme Court has held in the cases,

Mutual Benevolent Life Insurance Co. vs. Newton, 89 U. S., 32; 22 Wall, 36,

that proofs of death furnished by beneficiaries are admissible on behalf of the insurance company in actions on the policy, and are prima facie proof against the plaintiff of the facts therein stated, including the fact of suicide; and are conclusive unless plaintiff shows that the statements made were erroneous, or were given through mistake or misapprehension of the facts, or in ignorance of material matters subsequently ascertained.

This case also held that where the proofs of death contained a certified copy of the

coroner's inquest, including the verdict, these were admissible.

In the case of:

Keels vs. Mutual Reserve Fund Life Insurance Association, 29 Fed., 198,

the court held that in an action on a life insurance policy, if there be doubt whether the death was the result of accident or suicide, this doubt must be resolved in favor of the theory of accident. But in this particular case, the plaintiff having, in her proof of death, stated to the company that the death was by suicide, it is incumbent upon her to satisfy the jury that in this statement she was mistaken, and that the death was the result of accident. The court said:

"It meets the presumption that the death is accidental and puts on her the burden of showing her mistake."

To the same effect are the cases of:

Sharland vs. Washington Life Insurance Company, 101 Fed., 206,

decided by the Court of Appeals for the fifth circuit; and

Hassencamp vs. Mutual Benevolent Life Insurance Company, 120 Fed., 475.

Other cases can be found in Cooley's Briefs on Insurance, page 5468, where he states that generally the proofs of death furnished by beneficiary and any certificates made a part thereof, are admissible in evidence to show that the insured committed suicide, and satisfy the presumption against suicide.

In most states we find that there has been passed a uniform statute creating Bureaus of Vital Statistics, and providing for the registration of births and deaths. Under the terms of this Act, we find that the certificate of the State Registrar is prima facie evidence in all courts, of the facts therein stated, and that the certificate is required to state the means of death and whether accidental, suicidal, or homicidal. The Court of Appeals for the third circuit, in the case of:

Jensen vs. Continental Life Insurance Company, 28 Fed., (2) 545,

admitted the coroner's verdict, properly certified by the Registrar's office, although not

a part of the proofs of death, as prima facie evidence of the fact that the insured committed suicide. In the case of:

Connecticut General Life Insurance Company vs. Maher, 70 Fed. (2) 441,

the court admitted such a certificate as prima facie evidence under the California statute; and in the case of:

Von Crome vs. Travelers Insurance Company, 11 Fed. (2) 350,

it was admitted under a Missouri statute. Judge Dawkins of the Western District of Louisiana also admitted certificates under the Louisiana statute, in the cases of:

Featherstone vs. New York Life Insurance Company, and Dodson vs. New York Life Insurance Company.

However, in the case of

New York Life Insurance Company vs. Anderson, 66 Fed. (2) 705,

the court held that where the state court of last resort had held that under such a statute the certificate was not admissible to show suicide, it was bound by that interpretation of the statute, and that the certificate must be excluded.

A reading of the cases, together with the limited experience I have had in trial work, has led me to the following conclusions:

First: That an effort should be made to get the Supreme Court of the United States to grant a writ of certiorari in some case for the purpose of determining the correct rule that the Federal Courts should follow. Primarily, the Supreme Court of the United States is responsible for a great deal of the misunderstanding as to the use of "presumptions" in suicide cases, as a result of the decision in:

Travelers Insurance Company vs. McConkey, 8 S. Ct. Rep., 1360,

decided in 1888.

In this case, suit was brought upon an accident policy providing for payment where death was due to bodily injuries effected through external, violent and accidental means. It also provided that the insurance

should not extend to death effected by suicide. The question before the Supreme Court was the correctness of the charge of the lower court, which was to the effect that the burden of proving suicide, even though it was a suit upon an accident policy, was upon the defendant. The Supreme Court, in approving this charge, said:

"There is no escape from the conclusion that, under the issue presented by the general denial in the answer, it was incumbent upon the plaintiff to show, from all the evidence, that the death of the insured was the result, not only of external and violent, but of accidental, means. * * *"

Going on, however, the Court said:

"* * * Were the means by which the insured came to his death also accidental? If he committed suicide, then the law was for the company, because the policy, by its terms, did not extend to or cover self-destruction, whether the insured was at the time sane or insane. In respect to the issue as to suicide, the court instructed the jury that self-destruction was not to be presumed. In Mallory vs. Insurance Co., 47 N. Y., 54, which was a suit upon an accident policy, it appeared that the death was caused either by accidental injury or by the suicidal act of the deceased. 'But', the court properly said, 'the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person.' Did the court err in saying to the jury that, upon the issue as to suicide, the law was for the plaintiff, unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition that direct and positive proof must be made of death having been caused by external, violent, and accidental means, did not deprive the plaintiff when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts.* * *"

This language has been cited over and over by courts in cases falling into the second, third, and fourth categories. It has been interpreted time and again as meaning that the burden as to suicide in accident cases really falls upon the insurance company.

For instance, in the Ross case, which we have discussed, we find the court considering itself bound by the McConkey case, saying that "except for that case the charge would not seem to us to properly apply the abstract principle of law," and in the concurring opinion we find the judge saying of this case:

"As I read the charge of the trial court in the McConkey case, it was that the burden of proof to show accident, rather than suicide, was on the plaintiff, but that, if the evidence of each was equally balanced, then the law was for the plaintiff."

Second: That an attorney for an insurance company should examine the jurisprudence of his state to see whether or not the jurisprudence of the Federal Court is more favorable, and whether or not he should remove the case to the Federal Court. For instance, in Louisiana, because of the requirement as to the proof of suicide, cases are removed to the Federal Court, although if left in the state court they would be tried without a jury.

Third: That an attorney for an insurance company should struggle to prevent the court in accident cases from talking of the presumption against suicide, and from charging the jury that the burden of proof as to suicide is upon the defendant. The presumption should, if the defendant has offered any evidence at all, have disappeared from the case under the correct rule, so that there is no need for the judge to talk about it to the jury. It has been my experience that a charge which speaks of the presumption against suicide, and in any way infers that there is a burden to prove suicide upon the defendant, is prejudicial, as the jury is very much impressed by the fact that the insurance company carries the burden of proof, without exactly understanding what is meant thereby; and it is a decided disadvantage insofar as the insurance company is concerned.

Fourth: That a distinction as to who has the burden of proof, in cases where a suit is brought on a life policy both for the face value and the double indemnity, is very valuable in the directing of a verdict. If the plaintiff has the burden of proof as to the accidental feature, the court is often in the position to direct a verdict—where it would not be if the defendant carried the burden of proof.

Fifth: That an attorney for an insurance company should use every means in his power

to introduce the proofs of death and the coroner's verdict, and thus, by this means, do away with the presumption against suicide. In many instances this can be introduced during the plaintiff's case, or the plaintiff can be forced to introduce it; and this often destroys the burden of going forward with the evidence, and makes plaintiff explain away the effect of the coroner's verdict, and allows the defense to cross-examine witnesses who are unfavorable, and whom otherwise it would have to use as its witnesses.

When we stop to think of the number of suicides that occur today, and the percentage of the loss ratio due to suicides, there is no reason why the courts should show such great respect for the presumption against suicide.

In the book entitled "*To Be Or Not To Be*," by Louis I. Dublin, Statistician and Third Vice President of the Metropolitan Life Insurance Co., the following statistics are given as to suicide:

That the death rate due to suicide in 1932 was 18.8 per hundred thousand;

That the losses to American life insurance companies, due to suicide in 1932 amounted to seventy-five millions of dollars;

That suicides accounted for 4½% of all deaths in 1930, and that they increased during the next two years.

There is no reason why, when a court (as in the cases of:

Selover vs. Aetna Life Insurance Company, and New York Life Insurance Company vs. Ross,

cited previously), practically admits it is following the wrong rule, but is doing so because of *stare decisis*, an attempt should not be made to persuade it to change the rule, upon the basis of the present tendency of the American people to commit suicide; and statistics should be brought into court to show just how prevalent this tendency is.

I have collected, in the appendix, other cases which I have read upon the subject in preparing this paper, and which I hope will prove of some value to attorneys for insurance companies.

APPENDIX

The Second Circuit:

Messervey vs. Standard Accident Insurance Company of Detroit, Michigan, 58 Fed. Rep. (2) 186.

The Third Circuit:

Jensen vs. Continental Life Insurance Company, 28 Fed. (2) 545.

Tabor vs. Mutual Life Insurance Company, 13 Fed. (2d) 765.

The Fourth Circuit:

Graves vs. Mutual Life Insurance Company, 25 Fed. (2d) 705.

Parrish vs. Order of Commercial Travelers, 232 Fed. 425.

The Fifth Circuit:

New York Life Insurance Company vs. Weaver, 8 Fed. (2) 680;

Burkett vs. New York Life Insurance Company, 56 Fed. (2) 105;

New York Life Insurance Company vs. Trimble, 69 Fed. (2) 849;

Travelers Insurance Company vs. Wilkes, 76 Fed. (2) 701;

New York Life Insurance Company vs. Bradshaw, 2 Fed. (2) 457;

Love vs. New York Life Insurance Company, 64 Fed. (2) 829;

New York Life Insurance Company vs. Brown, 39 Fed (2) 376.

The Sixth Circuit:

New York Life Insurance Company vs. Ross, 30 Fed. (2) 80;

Standard Life & Accident Company vs. Thornton, 100 Fed. 582.

The Seventh Circuit:

Ocean Accident & Guaranty Corporation vs. Schachner, 70 Fed. Rep. (2 S) 28;

Metropolitan Life Insurance Company vs. Hogan, 63 Fed. Rep. (2) 654;

The Eighth Circuit:

Mutual Life Insurance Company vs. Hatten, 17 Fed. (2) 889;

New York Life Insurance Company vs. Anderson, 66 Fed. Rep. (2) 705;

Von Crome vs. Travelers Insurance Company, 11 Fed. Rep. (2 S), 350;

Tschudi vs. Metropolitan Life Insurance Company, 72 Fed. Rep. (2 S) 306.

The Ninth Circuit:

U. S. Fidelity & Guaranty Company vs. Blum, 270 Fed., 947;

Metropolitan Life Insurance Company vs. Broyer, 20 Fed (2) 818;

Wells Fargo Bank & Union Trust Company vs. Mutual Life Insurance Company of New York, 8 Fed. Supp., 916;

Connecticut General Life Insurance Company vs. Maher, 70 Fed. (2) 441.

The Tenth Circuit:

Frankel vs. New York Life Insurance Company, 51 Fed. Rep. (2), 933;

Wirthlin vs. Mutual Life Insurance Company of New York, 56 Fed. Rep. (2) 137;

Missouri State Life Insurance Company vs. West, 67 Fed. (2) 468;

Travelers Insurance Company vs. Bancroft, 65 Fed. (2) 963.

United States:

Travelers Insurance Company vs. McConkey, 8 S. C. R., 1360.

Alabama: (II)

New York Life Insurance Company vs. Jenkins, 158 So. 309;

Protective Life Insurance Company vs. Swink, 132 So., 728;

Mutual Life Insurance Company of New York vs. Maddox, 221 Ala., 292; 128 So., 368.

Arizona: (III)

Young vs. Mutual Life Insurance Company of California, 9 Pac. Rep. (2) 191; 79 Insurance Law Journal, 160.

Arkansas: (III)

Aetna Life Insurance Company vs. Taylor, 126 Ark., 155; 193 S. W., 540;

Business Men's Accident Association of America vs. Cobb, 131 Ark., 419; 199 S. W., 108;

Watkins vs. Reliance Life Insurance Company, 238 S. W., 10.

California: (II)

Wilkinson vs. Standard Accident Insurance Company, 180 Pac., 607;

Byers vs. Pacific Mutual Life Insurance Company, 24 Pac. Rep. (2), 829;

Dart vs. Prudential Insurance Company of America, 40 Pac. Rep. (2 S) 906;

Postler vs. Travelers Insurance Company, 158 Pac., 1023.

Illinois: (II)

Anderson vs. Interstate Business Men's Accident Association of Des Moines, Iowa, 188 N. E., 844; 82 Insurance Law Journal, 1572;

Fidelity & Casualty Company of New York vs. Weise, 55 N. E., 540;

Wilkinson vs. Aetna Life Insurance Company, 88 N. E., 550.

Indiana: (I)

Modern Woodmen of America vs. Kincheloc, 93 N. E., 452.

Kentucky: (I)

Massachusetts Mutual Life Insurance Company vs. Bush, 33 S. W., (2) 351;

Vicars vs. Aetna Life Insurance Company, 158 Ky., 1; 164 S. W., 106;

Bingham vs. Continental Casualty Company, 219 Ky., 501; 293 S. W., 968.

Louisiana: (IV)

Michel vs. London & Lancashire Indemnity Company, 162 La., 159;

Faulk vs. Mutual Life Insurance Company, 160 La., 529;

Webster vs. New York Life Insurance Company, 160 La., 854.

Maryland: (I)

Globe Indemnity Company vs. Reinhart, 137 Atl., 43.

Michigan: (II)

Powers vs. Loyal Protective Insurance Company, 253 N. W., 250.

Minnesota:

Farrar vs. Locomotive Engineers Mutual Life & Accident Insurance Co., 173 N. W., 705.

Massachusetts: (II)

Nicholls vs. Commercial Travellers Eastern Accident Association; 221 Mass., 340; 109 N. E., 449;

Bohaker vs. Travelers Insurance Company, 215 Mass., 342; 102 N. E., 342.

Mississippi: (II)

Massachusetts Protective Association vs. Cranford, 102 So. 172;

Bayles vs. Jefferson Standard Life Insurance Company, 148 S., 465.

Missouri: (I)

Brunswick vs. Standard Accident Insurance Company, 278 Mo., 154;

Griffith vs. Continental Casualty Company, 253 S. W., 1043.

Nebraska: (I)

Grosvenor vs. Fidelity & Casualty Company of New York, 168 N. W., 596;

Sawyer vs. Mutual Benefit Health & Accident Association, 237 N. W., 615; 77 Insurance Law Journal, 1208;

Peabody vs. Continental Life Insurance Company, 257 N. W., 482.

New Jersey: (I)

Kresse vs. Metropolitan Life Insurance Company, 168 Atl., 634.

New York: (I)

Weil vs. Globe Indemnity Company, 166 N. Y. Supp., 225,

Murphy vs. Commercial Insurance Company, 272 N. Y. Supp., 647; 83 Insurance Law Journal, 1277;

Whitlatch vs. Fidelity & Guaranty Company, 149 N. Y., 45.

North Carolina: (III)

Wharton vs. New York Life Insurance Company, 178 N. C., 135; 100 S. E., 266.

Pennsylvania: (I)

Watkins vs. Prudential Insurance Company of America, 173 Atl., 644.

Utah: (II)

Carter vs. Standard Accident Insurance Company, 238 Pac., 260.

Washington: (III)

Selover vs. Aetna Life Insurance Company, 38 Pac. Rep. (2), 1059;

Buckley vs. Massachusetts Bonding & Insurance Company, 192 Pac., 924; 113 Wash., 13.

Wisconsin: (II)

Pagel vs. U. S. Casualty Company, 148 N. W., 878.

(Note: The Roman letters refer to the classes of cases as defined in the paper).

The Mortgagee Under the Standard or Union Mortgage Clause, Some of His Rights and Liabilities

By LIONEL P. KRISTELLER,
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ANY analysis of the standard or union mortgage clause in a fire insurance policy must proceed from the basic proposition that this clause does not change the intrinsic nature of a policy of fire insurance, i.e., that it is a contract of indemnity against loss or damage resulting from fire¹. It is surprising how many prominent members of the bench and bar misconstrue the union mortgage clause into a guaranty of payment of a mortgage upon the mere happening of one condition precedent, the occurrence of a fire.

I would not impose upon your time with this statement of a most fundamental and elementary principle of fire insurance law, were it not for the fact that but recently the New York Court of Appeals rendered an opinion throwing the status of the parties to the mortgagee clause into a state of seemingly inextricable confusion. I refer to *Savarese vs. Ohio Farmers' Insurance Co.*,² which case has probably caused counsel for insurance companies more sleepless nights than any other case since the same Court hurled its earlier bombshell in *Heilbrun vs. German Alliance Insurance Co. of N. Y.*³ In the *Savarese* case, a fire occurred on premises covered by a policy containing a union mortgage clause. After the time within which the company was permitted an election to repair had expired, the mortgagor arranged with some contractors to repair the building. The premises having been restored to the condition in which they were before the fire, the insurance carrier was about to pay the contractors the cost of the repairs, when, the mortgagee brought suit to recover the damage done by the fire. The majority opinion of the New York Court of Appeals held that the mortgagee was entitled to recover. The restoration of the building was held immaterial. The net result was, that the building was fully restored, the mortgagee's security was in no way impaired, and

yet, he was permitted to recover the full amount of the damage done to the building. The mortgagee ultimately found himself in the enviable position of being handsomely indemnified for a loss which he never sustained. In no way can this case be squared with the theory that a fire insurance policy is a contract of indemnity—not a wager with the mortgagee that a fire will not occur during the term the policy is in force, or that in the event of a fire the mortgagee will be paid the full amount of the loss irrespective of any other considerations. An earlier New York case, *Uhlfelder vs. Palatine Insurance Co.*⁴ had denied a recovery to a mortgagee under a union mortgage clause, because "the capacity of the mortgaged property to pay the mortgagee's debt in nowise was diminished by the fire." It is unfortunate that the New York Court saw fit to repudiate this test.

In *Rhode Island*, a case closely paralleling the *Savarese* case, was decided and the same result reached.⁵

However, the great majority of the jurisdictions have veered to the attitude that in order for a mortgagee to recover under a union mortgage clause, he must prove two things:

- (1) An impairment of his security; and,
- (2) The fact that such impairment resulted from a fire.

A quite recent New Jersey case, *United Bond & Mortgage Co. of Hackensack vs. Concordia Fire Insurance Co.*,⁶ laid emphasis on the second of these requirements. In that case suit was brought by a second mortgagee under a union mortgage clause. After the fire, the first mortgagee foreclosed, wiping out the second mortgagee's interest. The Court denied a recovery to the second mortgagee, on the ground that the loss sustained resulted from the foreclosure, and not the fire. Before we can hope to have many decisions of this type, it will be necessary to convince the courts, and educate the members of the bar in general, of the real purpose of a fire in-

¹"A mortgagee's insurance is a contract of indemnity against the loss which he may sustain thru the destruction of the mortgagor's property." *Williams Mfg. Co. vs. Insurance Company of North America*, 81 Atl. 916 (Vt.).

²182 N. E. 665.

³95 N. E. 823, affirming 125 N. Y. S. 374.

⁴89 N. Y. S. 793.

⁵*Old Colony Co. Cooperative Bank vs. Yorkshire Insurance Company*, 167 Atl. 111.

⁶172 Atl. 373.

insurance contract. There may be institutions which guarantee the payment of mortgages. That was never the function of a fire insurance company.

Although the rights and liabilities of the parties to the union mortgage clause have been the subject of judicial determination for many years, many controversies still rage over the subject in the various jurisdictions; indeed, in some states, conflicting decisions may be found on an identical point. The best way to remedy this unfortunate situation is to draft an entirely new clause. Not having the time to allude to all of the changes in the present clause which I deem desirable, I shall mention but a few of the more pressing problems.

To begin with, there is the question of a change of ownership coming to the knowledge of the mortgagee, which he does not communicate to the insurance carrier. The union mortgage clause is quite definite in the statement that in that event the policy shall be null and void. A great many courts take this statement at its face value, and give this provision its intended meaning.¹ But there are probably an equal number of jurisdictions, which read into the clause provisions which were never intended to be read therein. Such a result can only be circumvented by expressly negating such provisions in the clause by clear and explicit terms.

In Delaware, recently, the Court had presented to it a situation² where both the first and second mortgagees were covered by a union mortgage clause. The second mortgagee foreclosed and then took title to the premises without notifying the company. A fire occurred, and the plaintiff, formerly the second mortgagee, now the owner of the premises, was allowed to recover the amount of the loss remaining after the first mortgagee's interest was satisfied. The court found for the plaintiff and dismissed the defense of known change of ownership unreported to the company on the ground that

there was no increase in the risk³, and that was all the provision for reporting change of ownership was intended to guard against.

The sequel to this case⁴, while not strictly a part of the discussion of this point, is too interesting to omit. The insurance company paid the first mortgagee the loss he had sustained, and demanded and received subrogation because of non-liability to the owner due to a change of ownership. The carrier then sought to set off the amount of the first mortgage—which had been assigned to it upon its demand for subrogation—against the judgment recovered by the present owner, the former second mortgagee. Proceedings were then instituted in the Federal Court to enjoin the company from using this method to defeat a recovery, but an injunction was refused.

The Nebraska Court, in an early case⁵, refused to void a mortgagee clause for failure of the mortgagee to report a known change of ownership, on two grounds:

- (1) No increase in hazard or risk was proven; and
- (2) No time limit within which the change of ownership need be reported was contained in the policy.

The Washington Court found itself in a difficult position in allowing a recovery to a mortgagee who had foreclosed and taken title but was covered only by a union mortgage clause. Finally this court arrived at an ingenious interpretation of the provision now under discussion by a finding that, "the change of ownership mentioned in the clause evidently refers to a sale to some other person with whom the insurance company was not under contract."⁶ The difficulty in arguing against that kind of decision is, that it is more the result of a state of mind than the product of cogent, legal reasoning. So, as long as courts will adopt these methods to defeat the clear intent of the policy,⁷ the union mortgage clause must be made still clearer; and, there must be included therein provisions to the

¹Delaware Ins. Co., vs. Green, 120 F. 916.

Newark Fire Ins. Co. vs. Pruett, 227 P. 823 (Colo.)

Continental Ins. Co. vs. Anderson, 33 S. E. 827 (Ga.)

Union Trust Co. vs. Phila. Fire & Marine Ins. Co., 145 Atl. 243 (Me.)

Trust Co. of St. Louis County vs. Phoenix Ins. Co., 210 S. W. 98 (Mo.)

Altschuler vs. New Brunswick Fire Ins. Co., 176 Atl. 359 (N. J.)

²Kimberley & Carpenter, Inc. vs. National Liberty Ins. Co. of Am., 157 Atl. 730.

³See also Whitney vs. American Ins. Co., 56 P. 50 (Calif.)

⁴Kimberley & Carpenter, Inc. vs. Firemen's Fund Ins. Co., 6 F. Supp. 255.

⁵Phoenix Ins. Co. vs. Omaha Loan & Trust Co., 60 N. W., 133.

⁶Oregon Mtg. Co. vs. Hartford Fire Ins. Co., 210 P. 385.

⁷See, Employers' Fire Ins. Co. vs. Ritter, 164 Atl. 426 (N. J.)

Ormsby vs. Phoenix Ins. Co. of Brooklyn, 58 N. W. 301 (S. Da.)

effect that any unreported change of ownership known to the mortgagee will void the policy whether or not there is an increase in hazard, even tho the new owner is a party to the contract. Insurance companies must retain the right to select their own risks, and determine for themselves what is an increase in hazard. It is grossly unfair to force the companies to rely upon the court's judgment after the fire as to whether or not the risk was increased.

In Maine the pendulum of decisions has swung to the other end in interpreting this provision.¹⁴ The Courts of that State do not require actual notice of change of ownership to void the policy, but merely "such knowledge of facts as would induce a man of ordinary prudence to make further inquiries." While this doctrine has elsewhere been uniformly rejected,¹⁵ it is encouraging to note one court reading into the policy something of advantage to the companies.

The new union mortgage clause should contain a provision that any mis-statement made by either the mortgagor or mortgagee in obtaining the policy shall void the same whether or not such mis-statement was known to the mortgagee. The present holdings almost unanimously reject this conception,¹⁶ but I am convinced that it is sound insurance practice to provide for it in the policy. The right of a mortgagee is essentially that of a third party beneficiary. In no other form of contract may a third party beneficiary, tho entirely innocent of any fraud or knowledge thereof, receive any benefit from a contract which was fraudulent ab initio. The same rule should apply in insurance policies. I fully recognize the economic and social necessity of giving the mortgagee adequate safeguards against impairment of his security by fire. But it must also be recognized that fire insurance companies can survive, and give this protection, only if they are permitted to select their risks and are not saddled with liability under contracts which they would never have entered into had they been aware of the true facts. The addition of such a clause puts

the mortgagee to no disadvantage. It was always his privilege, and he should be required, to inspect the application of the mortgagor for the policy and correct any false or fraudulent statements contained therein.

The new union mortgage clause which I suggest would also clear up the mooted question of the duty of the mortgagee to file a proof of loss when the mortgagor fails to do so. The decisions now cover the widest conceivable range. Most of the courts which have passed on the point have relieved the mortgagee of any duty to file a proof of loss, even when the mortgagor fails to do so.¹⁷ After the New York Court committed itself to this doctrine in the famous Heilbrun case¹⁸ a note writer in the Michigan Law Review¹⁹ suggested that this result might be traceable to the "somewhat indefinite phraseology of the policy." This criticism of the policy was voiced in 1911, but nothing has as yet been done in many of the states to remedy the situation.

Other decisions put an absolute duty upon the mortgagee to file a proof of loss when none is filed by the mortgagor.²⁰ Still another line of cases holds that the mortgagee has the right to file a proof of loss although the policy calls for such filing by the "insured," but these cases hedge on the mortgagee's duty in this regard. Another court has committed itself to the holding that if the mortgagor fails to file a proof of loss, the mortgagee, protected by the union mortgage clause, must do so within a reasonable time after receiving knowledge of the fire.²¹ This last reservation is a fair and necessary one, for as may often happen, a mortgagee may be resident far from the locus in quo and may not know of the fire until some time after the occurrence thereof.

¹⁴Secombe vs. Glens Falls Ins. Co., 188 P. 305 (Cal.)

Bank of Oroville vs. Minnesota Fire Ins. Co., 23 P. (2) 83 (Cal.)

Queen Ins. Co. vs. Dearborn Savings Loan & Bldg. Ass'n, 51 N. E. 717 (111.)

Peterson vs. Mechanics' & Travelers Ins. Co., 123 So. 596 (La.)

Adams vs. Farmers' Mutual Fire Ins. Co., 90 S. W. 747 (Mo.)

Riddell vs. Rochester German Ins. Co., of N. Y., 89 Atl. 833 (R. I.)

Reed vs. Firemen's Ins. Co., 80 Atl. 462 (N. J.)

¹⁵No. 3, supra.

¹⁶Michigan Law Review, 426.

¹⁷Southern Home B. & L. Ass'n vs. Home Ins. Co. of New Orleans, 21 S. E. 375 (Ga.)

¹⁸Union Inst. for Savings vs. Phoenix Ins. Co., 196 Mass. 230.

¹⁴Union Trust Co. vs. Phila. Fire & Marine Insurance Co., No. 7, supra.

¹⁵Concordia Fire Ins. Co. vs. Commercial Ins. Co., 39 F. (2), 826.

N. Y. Underwriters Ins. Co. vs. Central Union Bank of S. C., 65 F. (2), 738.

Witherow vs. United American Ins. Co. of Pa., 28 P. 668 (Cal.)

¹⁶But contra see: Fidelity-Phoenix Insurance Co. vs. Garrison, 6 P. (2) 47 (Ariz.)

My recommendation therefore is, that when, as, and if a new union mortgage clause is drawn, a provision be contained therein that the right of the mortgagee to recover is conditioned upon his filing sworn proof of loss with the company within sixty days after he receives knowledge of the fire. The mortgagee should be required to file such proof even though the mortgagor has already done so. Often a mortgagor, aware that he has already forfeited his right to recover and consequently not deterred by the false swearing clause of the policy, will file a preposterously fraudulent proof of loss. If the mortgagee adopts this proof of loss as his own, he should be forced to accept responsibility for such fraud and false swearing; and, the company should be released from liability. There is a glaring inconsistency in permitting the mortgagee to adopt as his own the proof of loss filed by the mortgagor to satisfy the provision of the policy requiring its filing, and at the same time escape responsibility for its statements when the clause providing for release from liability in the event of false swearing is invoked by the company. The only solution seems to be to require the mortgagee either to file his own proof of loss, or, to adopt the one filed by the mortgagor; and, accept full responsibility for its statements or mis-statements.

Probably as perplexing a problem as there is in the whole field of mortgagee insurance, arises when an insurance company desires an appraisal made of a loss which was covered by a policy to which was attached a union mortgage clause.

The clause itself, does not advert to this problem at all. The cases on the subject are irreconcilable and there is something to be said in support of almost every holding. Let us examine the holdings on the subject.

Within the past eight months, an intermediate Court of Appeals of Missouri had presented to it this set of facts:²² Following a fire, the mortgagor and the company, without consulting the mortgagee, appointed appraisers who estimated the loss. The mortgagee then sued and recovered despite the appraisal. Action was then brought by the mortgagor on the appraisers' award. The suit was dismissed on the ground that the appraisal was of no force or effect, since by the terms of the mortgagee clause, no act of the mortgagor could prejudice the mortgagee's

rights.²³ This is a holding with which there can be no quarrel.²⁴

But within a month after this opinion was rendered, a Missouri Court of a standing equal to the one just mentioned announced the following opinion:²⁵ A Missouri Statute gives the insured the right to have the company repair the building in case of a partial destruction. A mortgagor sought to have the company rebuild, but the company refused to do so on the ground that the option to have the premises re-built, or receive the money, belonged to the mortgagee. The Court agreed with the mortgagor.²⁶

In view of these two decisions, what position may a company take in settling a loss in Missouri? The mortgagee must choose the appraisers, but the option to have the premises rebuilt belongs to the mortgagor. It is difficult to say whether the mortgagor or mortgagee has the final say on a settlement in Missouri.

Another line of cases holds that the union mortgage clause does not wipe out the company's right to demand an appraisal, providing the mortgagee is notified of the company's demand and participates in the appraisal.²⁷ Here, I believe, we have the rational solution to the problem, and the one which should be embodied in the clause I hope to see drawn and standardized. The question of the mechanics of such an appraisal may prove difficult, if, as so often happens, the mortgagor and mortgagee cannot agree on one appraiser to represent them both. In such a situation, the only way out of the difficulty seems to be to allow both the mortgagor and mortgagee to appoint one appraiser each, and the carrier to appoint two appraisers. If a majority of this committee cannot agree on the amount of loss, an umpire can be chosen by them. This rather complicated procedure

²²To the same effect:

Scottish Union Natl. Ins. Co. vs. Field, 70 P. 149 (Colo.)

Collinsville Savings Society vs. Boston Ins. Co., 60 Atl. 647 (Conn.)

Royal Ins. Co. vs. Ward, 68 S. W. (2) 9, (Ky.)

Bewer Falls B. & L. Ass'n vs. Allemania Fire Ins. Co., 157 Atl. 616 (Pa.)

²³Contra—Erie Brewing Co. vs. Ohio Farmers Ins. Co., 89 N. E. 1065 (Ohio).

²⁴Payne vs. Bankers' & Shippers' Ins. Co. of N. Y., 77 S. W. (2) 1183.

²⁵Accord: State Bank of Chilton vs. Citizens' Mutual Fire Ins. Co., of Janesville, 252 N. W. 164 (Wis.)

²⁶Penn. Co. for Ins. of Lives, Etc. vs. Aachen & Munich Fire Ins. Co., 257 F. 189.

²⁷Gordon vs. Northwestern Nat. Ins. Co., 77 S. W. (2) 512.

should be set out in detail in the clause, for, some one of the many courts which display such a marked antipathy toward the insurance companies will be setting up appraisal boards consisting of one appointee each by the mortgagor, mortgagee, and company, which would be manifestly unfair.

The settlement of a loss covered by a policy protecting one or more mortgagees is at present a cumbersome and expensive procedure. The company has one of two alternatives: (1) to secure the consent of all parties involved to the proposed settlement; or, (2) to litigate.

This problem becomes especially acute when there is a second mortgagee protected by the same clause which covers the first mortgagee. This situation often enables the second mortgagee to indulge in something akin to blackmail. The mortgagor, first mortgagee, and company will be in complete accord, as to the terms of a settlement for a loss which does not exceed the first mortgagee's interest, and, therefore, does not render the company liable to the second mortgagee; but the latter will demand a portion of the settlement or threaten suit. Faced with this threat, the parties, although acting in complete bona fides, must either submit to the extortion, or go through expensive and unnecessary litigation.

I am not advocating that prior encumbrancers be given any opportunity to squeeze out subsequent encumbrancers; but, I do believe that the mortgagee clause should provide for a quick and inexpensive way of dividing the insurance money between the various claimants covered by the policy as their interests appear once the total amount of the loss is ascertained.

There have been two cases where the mortgagee clause covered the interests of both the

first and subsequent mortgagees.²⁸ After the fire, the company made a claim of no liability to the owner, settled the loss with the first mortgagees, and took an assignment of the first mortgage under the doctrine of subrogation. In both the cases, the Court ruled that the insurance company's lien on the premises was now inferior to that of the subsequent mortgagee covered by the same policy. I think these cases are good law, since it would be grossly unfair to allow the insurer to step in ahead of the interests it was insuring; but the cases indicate the hopeless vacuum in which the companies are still groping in their attempts to settle claims involving more than one interest.

The present clause is a good skeleton for a new union mortgage clause. It is nothing more than that. The companies cannot afford to trust to the vagaries of judicial decisions. They should have their rights and liabilities predetermined. This can only be done by a complete and adequate mortgagee clause, the language of which should be clear, precise and comprehensive.

The Insurance Section of the American Bar Association is already considering and recommending the adoption of a new form of standard or union mortgage clause.

I earnestly urge that this body do likewise. I have pointed out but a few of the more pressing problems which need study and clarification. There are many more. The time is now ripe for concerted action along this line. The more time we permit to elapse before the work is begun, the deeper will be the morass of conflicting judicial opinion from which we will have to extricate ourselves.

²⁸Mutual Fire Ins. Co. vs. Dilworth, 173 Atl. 22 (Md.)

Peretta vs. St. Paul Fire & Marine Ins. Co., 174 N. Y. S. 131.

Guarding Insurance Against Political Spoliation

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POLITICAL regulation, control and even suppression of business seem to be the chief ambition of our modern lawmakers. Strangling private enterprise with a garrote of statutes, rules and executive orders is the prevailing obsession. Those who attempt to rule

over us to a large degree seem possessed with the idea that genius is a disease, that individual initiative is a mortal sin, that seeking a fair profit in some way violates the Ten Commandments, and that possession of wealth is a crime. And when genius, aided by initia-

tive, produces profit and wealth the operation is often looked upon with horror and attempts are at once made to put an end to such nonsense.

This is not a particularly new tendency. It has been developing over a long period of years, but its chief manifestation has been disclosed since the close of the World War. Attacking business, has, of course, always been the chief stock in trade of demagogues and political spoilsmen, ably supported by radicals of every hue and type, by professional altruists and by unsophisticated pundits. Strangely enough, however, the attack is always more potent when business is least potent; when public nourishment is most needed, a starvation diet is prescribed. That is the reason for the appearance during the last half decade of ever growing and increasingly stringent and petulant proposals for governmental domination of the economic life of the nation. In fact, a survey of the measures introduced in Congress and the various state legislatures this year and immediately prior years will reveal that business regulation and control has been the dominant political purpose.

It is not my intent to discuss the social significance of this movement or to reflect on the sincerity and motives of some of its supporters who obviously believe that they have been ordained to be the political and economic nursemaids of the present generation. Indeed, the nurse theory of government is so ancient and so hallowed by tradition that it is not particularly surprising to see a revival of it even among peoples who proudly proclaim themselves civilized. Such schemes have a habit of reappearing after long hibernations, to the dismay and consternation of those who unwittingly believe that a progressive and at last an orderly social and economic system has been attained.

Although I disagree with this modernistic variation of feudalism and believe that the intellectually honest among its supporters are misguided, yet I am not completely disheartened by its present show of vitality. The "law of the pendulum" often is exemplified in politics. As soon as a major political movement gains strength and asserts itself, a movement in the opposite direction usually sets in and accumulates power until the original movement is to a great extent nullified. The history of political ideas and ideals has been a continuous record of such fluctuations. Today feudal theories may be enjoying a rein-

carnation; tomorrow the swing of the pendulum well may carry us back to the democracy of our forefathers. Perhaps we now are in the midst of such a movement and do not fully realize it.

Our problem, however, is not one of theory. The pendulum doesn't swing back of its own accord. Public opinion supplies the power. And it is only by the support of a sound public opinion which recognizes the back-breaking burden our legislative system is today imposing on legitimate and honest business that this perilous situation can be relieved. To accomplish such a purpose, the whole-hearted co-operation of all those who know and understand the social and economic chaos which is sure to result from the attempts to place private enterprise in a straight-jacket of laws is absolutely essential.

We are today engaged in a wild orgy of lawmaking unparalleled in the history of the world. One year's output makes the Justinian Code look like McGuffey's First Reader. Quantitative government seems to be our besetting sin. The old qualitative theory which held that the government which governed least governed best is being scrapped. In its place we have the theory that to be governed is the chief end of man. If there be a Utopia in this world it must be a place where nobody is able to think up another law.

In general, I must adopt the quantitative method of demonstrating that this is indeed the "jazz age" of lawmaking and law proposing. Later, I shall try to give you a more qualitative analysis of lawmaking and law proposing in the field of casualty and surety insurance.

Recently a survey was made of the number of laws proposed and passed in the various legislatures and Congress for the 26-year period from 1906 to 1931, inclusive. The figures are of almost astronomical proportions. The total number of bills introduced was 1,214,779. Of these 308,752, or 25.4 per cent, actually were enacted into law. Although the actual count ended in 1931, due apparently to fatigue, it is estimated that at least 200,000 laws were proposed in the legislative sessions of 1932 to 1935, inclusive, of which probably 50,000 became laws. To satisfy my own curiosity I had a compilation made of all the session laws passed by state legislatures in 1933, and the total was 15,981, exclusive of Congress. That year there were 78 regular and special legislative sessions in 47 states and 3 territories, and the average

number of laws per session was 205. California led the procession with 1,058 enactments in a single meeting. New York was second with 835 in three sessions. North Carolina and South Carolina together did very well, however, totalling between them 1,197 new laws, 570 for North Carolina, and 627 for South Carolina. Maryland, for a comparatively small state, was one of the leaders, producing 711 laws in two legislative sessions. When the 1935 record is closed the results probably will be even more astonishing.

Many of these laws, of course, have little or no political or social significance. These, for the most part, may be classed as local and curative measures. But business, big and small alike, is the intended victim of an increasingly large number of them—the residuary legatee, if you please, of a legislative system which combine to a large extent vicious and spoils politics with callow economics and misguided altruism. No crucible can distill sanity from such a mixture. It is acts of this type which, of course, most concern us.

State legislatures and Congress, however, are not the only lawmaking bodies in this country. No estimate ever has been made to my knowledge of the number of municipal ordinances in existence or of the thousands upon thousands of rules, regulations, orders and decrees promulgated by administrative boards and public officials. Perhaps the extent of the lawmaking facilities of the United States of America can be better comprehended when it is known that there are 175,418 local governments. Of these 127,000 are school districts, 20,000 are townships, 16,000 are incorporated cities and villages, 3,000 are counties, and 8,600 miscellaneous districts. All have pay rolls; all have taxing power, and most of them do more or less legislating. It took two years for Professor Anderson of the University of Minnesota to compile this information.

I wish Sir Edward Coke could be resuscitated today. He said 300 years ago that "reason is the life of the law" and that "the law is the perfection of reason." One well may wonder what he would say after examining the output of the twentieth century law factories. He probably would have agreed with Montaigne that "it would be better for us to have no laws at all than to have them in so prodigious numbers as we have." In one of the Gilbert and Sullivan operas, the Lord Chancellors' song runs as follows:

*"The law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw,
And I, my Lords, embody the law."*

The political necromancers of today hold this belief, and are quite certain that they "embody the Law." Perhaps a revivification of the laws of the Medes and the Persians which "altereth not" might not be amiss.

I have called attention to our lawmaking proclivities in general in order to lead you to a better understanding of the effect of these proclivities on the business you and I represent. I am sure that I can say positively that the insurance business must contend with more laws, rules and administrative regulations—good, bad and indifferent—than any other privately conducted enterprise in this country. With the possible exception of banking, it is the patriarch of supervised business. Compared with it the railroads and the public utilities are neophytes in experience. The statutes (compiled laws) of the 48 states contain 4,272 pages devoted to insurance, not counting many laws enacted since these compilations were made. This is 3 per cent of the total number of pages—141,700. When it is remembered that these codes deal with almost every human activity, the space taken by insurance is an indication that legislative tinkering with it is an outstanding American habit. In addition, there are thousands upon thousands of judicial decisions affecting the insurance business, and the number of decrees issued by state insurance departments approaches the infinite.

The wide scope of state supervision is not generally realized. I am sure it is not an exaggeration to say that during the last quarter century regulation by the states has been marked by an attention to the details of the business unequalled in the history of the regulation of any other business in this country. Those engaged in providing insurance protection are licensed—agents, brokers and companies. The state passes upon the financial condition of the companies. It scrutinizes their assets, investments and financial operations, including the computation of reserve liabilities and the value of securities. It also exercises control over the kind and type of investments which the companies may make, and establishes rules concerning their outlays for their expenses and their payment of dividends. Increases and decreases in capital stock must have state approval. There also

are laws requiring companies to deposit securities with the state as a guaranty of good faith. In addition, the state undertakes to standardize policy forms in several of the most important branches of insurance. In nearly all states policy forms used therein must be filed with the commissioner. Rebating, discrimination, misrepresentation and twisting are prohibited in most jurisdictions. Annual reports filed by the companies with state departments form one of the most important parts of the regulatory machinery. The commissioner in every state is authorized to examine insurance companies, and many states require periodical examinations. In many states the administrative power of the insurance commissioner, under which he makes orders and rulings, gives to him a power which is greater than that of the governor.

I am not critical of the general policy of state insurance control and supervision. It is not a novel or modern undertaking and within legitimate bounds it probably exercises a salutary influence. There is nothing so sacrosanct about insurance which distinguishes it from a variety of other undertakings affected by a public interest, and it probably is just as well that the states in a general way exercise some control over its operations.

I do contend, however, that there has been an abnormal expansion during the last few years in the scope of state control, and that if this tendency is not curbed it well may prove not only disastrous to the business which we represent, but also will result in the imposing of additional heavy and unwarranted burdens on the public we serve. The effect of a blow aimed at insurance is not confined to insurance alone, but is felt throughout our economic and social structure, more so than the effect of a similar blow aimed at any other industry.

The casualty and surety branch of the business is perhaps concerned more than any other branch with the problem under discussion. It has been the most politically harassed. Government competition has affected it more than any other kind of insurance. One of the most extensive government ownership projects in America is to be found in the field of workmen's compensation insurance. There also are state funds for insuring public deposits in banks and for the bonding of public officials. For several years there has been a widespread agitation for compulsory automobile liability insurance which has been such

a burden on the companies, their agents, and the public in Massachusetts—the only state where it has been tried. The agitation is accompanied in most instances by the proposal that the insurance be furnished by a politically operated state fund to the exclusion of private insurance. State regulation of rates also has often placed unfair and burdensome restrictions on the casualty and surety business. There is a growing tendency to increase this control, and sometimes it is sponsored by those who make a living out of the business. When insurance men deliberately seek relief from their troubles by calling politicians into their business, they only will have themselves to blame if the politicians abscond with it. Any private enterprise which is so sick that it has to call in a state doctor always will be that doctor's paying patient—whether sick or well.

The need for money is acute in most states and a thorough search for it is being made by those who will benefit by the spending. Our business always has been an easy mark for the tax collector. It has been fighting increased exactions for a long time, and the issue is more serious today than ever before.

Up to July 1 there had been introduced this year, in 44 legislative sessions, 3,423 bills in some way affecting the casualty and surety business. Of these 652 were classified as objectionable—that is, if passed, they would have imposed unfair, uneconomic or impractical restrictions on the industry we represent. Fortunately few of these became laws, but those that did simply added to the already heavy load our companies and their agents are carrying.

It may be of interest to analyze a few of these measures. Forty bills providing for the creation of state funds made their appearance, indicating that state insurance continues to be a live issue. Of these 21 proposed workmen's compensation funds, 14 automobile liability insurance funds and 5 surety funds. The surety funds were either for the bonding of public officials or to secure public deposits. Only 2 state fund bills passed, however, and both of them were in the surety field; 1 in Nebraska for public official bonds, and 1 in Indiana for public deposits.

Twenty-six bills were introduced to increase premium taxes and 3 were passed—Connecticut, New York and Utah. Seventeen bills were for the purpose of newly imposing income taxes on insurance companies; none passed. Four bills were introduced to in-

crease existing income taxes; these failed, except in North Carolina where a constitutional amendment is to be voted on.

Rate regulation was not ignored. Forty-three bills dealing with that subject are to be found in the 1935 legislative record. Seven of these became laws, dealing with various phases of rate control, in the following states: California, Indiana, Maryland, Nebraska, Oklahoma, Washington and West Virginia.

Hospital lien laws always have been a source of annoyance to the casualty business. There were 45 bills introduced this year either newly providing for hospital liens or amending the present law on the subject. New Jersey enacted 2 laws amending the existing law and North Carolina passed a new law.

The demand for special deposits by insurance companies is growing. This is a particularly vexatious and burdensome type of legislation and threatens, if continued, to very seriously affect our business. Seventeen bills relating to this subject were introduced, but only 2 passed; one in New Mexico, increasing the amount of the deposit to \$25,000, and the other in Oregon, amending the existing law.

A new principle in casualty insurance regulation was born this year in the form of workmen's compensation security funds for the protection of compensation claimants against insolvent companies. This scheme, in general, requires contributions from solvent companies to pay the compensation awards against any company which fails. Ten bills were introduced providing for such funds or pools and four states inaugurated this system, namely, Minnesota, New Jersey, New York and North Carolina. That there will be a continuing agitation for this type of legislation seems certain, and the resultant menace to the sound compensation carriers cannot be overestimated.

Extending the benefits under workmen's compensation acts to include so-called occupational diseases is another development of the last few years which makes underwriting acutely treacherous. Seventy bills relating to this subject were introduced in the 1935 legislative sessions, and hardly one of them was actuarially or economically sound. In Nebraska, North Carolina and West Virginia new laws were enacted. California, Maryland, Michigan and New Hampshire appointed commissions to study the matter. Connecticut, New York and Massachusetts amended existing laws. Indeed, compensation for oc-

cupational diseases, with or without limitations as to their nature, has become not only a major problem of casualty insurance, but also of American industry. The insurance problem mainly has to do with adequate rates; the industrial problem mainly has to do with the ability of employers to pay adequate rates. As a result political issues are involved, including state fund proposals, which are bound to give all concerned headaches for some time to come.

Another of the new-fangled maladies which afflict the casualty insurance business well may be baptized "code-itis." This disease is spreading; it is catching. Brokers, agents, commissioners and even lawyers often suffer from it. Only insurance companies seem to be immune. This type of economic distemper usually is accompanied by a high political fever and a considerable amount of unctuous bally-hoo. Those who harbor the germ are veritable "Typhoid Marys."

This year new codes were introduced in seven states, namely, Arkansas, California, Georgia, Illinois, Indiana, Missouri and West Virginia. South Carolina and Texas enacted laws providing for the appointment of commissions to study insurance laws. Of the seven new codes proposed, only California and Indiana enacted them. The California code consists chiefly of a literary revision of the present laws and added nothing new of material importance. The Indiana code in its final form was not opposed by the companies. The codes which failed of enactment were, in part, all objectionable and contrary to the best interests of the business which we represent.

Much has been said and written about the insurance code proposed in Illinois. In its final form, many of the objections of the casualty and surety companies to the original draft had been eliminated. However, it still contained many dubious, bewildering and ambiguous sections, and its defeat was generally welcomed. Strange as it may seem, the organized agents and brokers of Illinois ardently advocated the code in its first form and continued their advocacy of it until the last. In doing this they were for the most part acting in direct opposition to the best interests of the companies they represented, and were endeavoring to dictate to these companies the laws under which they would be permitted to operate in the State of Illinois. This attitude may be traced back to the fact that the code provided for stringent agents'

and brokers' qualification tests, something both groups desired. In their efforts to gain this end, they apparently ignored the interests of the underwriters who carry the burden and pay the claims. These conflicts of interest should be eliminated.

In the admirable report submitted to this convention by your General Legislative Committee, of which Mr. Hervey J. Drake is the chairman, the following statement is made in regard to this situation:

"Companies have therefore been placed in the unfortunate position of being in opposition to insurance supervising officials and their own agents. We believe that the officials of insurance companies who are responsible for their management and continued success should be the best judges of the reasonableness and soundness of legislation affecting their companies. We are convinced that insurance companies and their organizations do not oppose reasonable and constructive legislation designed to promote the welfare of the public. We believe they are justified in opposing insurance codes or other bills containing provisions which virtually transfer the management and underwriting policies of the companies to the insurance departments of the various states, or to their agents."

To this doctrine I heartily subscribe.

Obviously the insurance codes of many states could be improved. Laws suited to conditions half a century ago are mingled with acts of today. In most instances, however, long established practice and custom have combined to bring about a system which in general meets immediate needs. In addition, court rulings have added definiteness and certainty to insurance regulation and procedure. New codes always have a tendency to disturb well settled precedents, bewilder underwriters, and keep the business in suspense. They unsettle for years issues which for years have been settled. They promote litigation and foster uncertainty in a business which lives on certainty. All of this is bad for insurance and equally bad for the insuring public. In most cases necessary reforms or changes best can be obtained by amending existing laws and without recourse to a major operation.

I have tried to show you some of the major problems insurance is facing as a result of political efforts to unduly burden it by regulation or to suppress it as a private en-

terprise. Our troubles, however, are only an incident to the more general campaign aimed at establishing a status of state serfdom for all business, even including agriculture heretofore immune. We have not been singled out for attack by the law factory operators and have suffered in excess chiefly because our forces are deployed along so many fronts. In a word, insurance is particularly vulnerable to political raids and the politicians have made the most of that fact. Because of the nature of the service provided and the protection offered, the casualty and surety branch of the business is in the front line trenches.

One well may wonder what the future has in store for the casualty and surety companies, their agents, their brokers and their attorneys, if a stop is not put to the tendency to choke it to death by regulation or to confiscate it in the name of the state. One year's legislative output of restrictive laws may not seem particularly important when added to the existing supply; and the cumulative effect of the burden our business is carrying can only be fully understood by comparing the present situation with the situation of ten or twenty years ago. I cannot predict what the status of our business will be in 1945, but I do feel that there will not be much left of it to worry about, if governmental interference with its sound and economic operation increases in the same proportion in which it has increased during the last two decades.

Our predicament is especially difficult to deal with because of its political nature. Sincerity is not one of the outstanding qualities of many of those who are trying to demoralize our business by placing unfair and uneconomic restriction on it. Neither do they primarily have the welfare of the public at heart. That is why it is so hard to combat them. That is why facts and logic often are wasted in arguing against their proposals. State funds, for example, are not promoted by buyers of insurance. They are conceived in the fertile brains of those who see in them a chance for patronage and power. Also, the passion to regulate somebody else is essentially a manifestation of spoils politics, and is the actuating motive back of much of the unfair legislation which afflicts us.

In my opinion, the guarding of insurance from such political spoliation as I have described is the duty of all those engaged in any way in the business. It is not only a duty they owe to themselves, but also a duty which they owe to the public they serve. We

would be remiss in our trust if we did not do everything in our power to protect our patrons against the impairment of their property as represented by their insurance contracts by destructive legislation to the same extent we are prepared to protect them against burglars and embezzlers. It is quite as essential that the insuring public be guarded against wild-cat government as it is that this same public be guarded against the risks and hazards of industry.

I have described some of the trials and tribulations of casualty and surety insurance at this meeting because I believe the members of this Association, individually and collectively, are in a position to be of great service to our business by wholeheartedly joining in the efforts being made to save it from political ravishment. This industry is your industry. You are as much a part of it as are company officials, agents and brokers. You have a very vital personal interest in its continued successful operation as a private enterprise, and anything which unduly interferes with its prosperity is bound to affect insurance counsel.

This Association already has done remarkably fine work through its officers, general legislative committee, and members generally in preventing obnoxious and objectionable legislation aimed at the casualty and surety business. It is only since your organization came into being that the companies have had any substantial degree of co-operation along these lines from the lawyers in the field who represent them in litigation. Since then, the Association of Casualty and Surety Executives has on numerous occasions solicited assistance from the International Association of Insurance Counsel with most encouraging re-

sults. We are indeed grateful for your continuing and helpful interest.

There is, however, a wider field of usefulness for members of this Association which hardly has been explored. Your activities in connection with legislative affairs have been largely confined to answering emergency calls for aid. The greatest need of insurance today is for a never ceasing promotion of its interests. If this business of ours is to escape from the dangers which seem almost to surround it, the necessity for the support of a sound public opinion is obvious. To obtain this is a task in which the co-operation of insurance lawyers is needed every day in the year. In this connection, I venture the suggestion that this Association appoint a Public Relations Committee to explore the opportunities for presenting in a public way, and also to your own members, the problems of the business. The Association of Casualty and Surety Executives and the National Board of Fire Underwriters have such committees, and I think I can assure you of their aid and guidance in the vital work of making insurance and the service it renders better known to those it serves.

The institution of insurance needs today more than ever before the intense and selfish loyalty and co-operation of all those engaged in its advancement. It needs the united power and influence of all its workers to safeguard it, its patrons and the public generally against the predatory incursions of political hi-jackers and the wild schemes of economic soothsayers. If we do not join forces to protect our business, the time may not be far distant when we shall have very little business left to protect.

To such activities I counsel you.

Use of the Declaratory Judgment in Determining the Constitutionality of Statutes and Acts Pursuant Thereto

By WILLIS SMITH,
of Raleigh, North Carolina

AT THE outset, let me reassure my hearers that the length of this paper and the time which I shall consume in presenting it to you is not in proportion to the length of the title. I am not undertaking to discuss in detail with you the various state statutes providing for declaratory judgments, nor am I attempting to treat exhaustively the Federal

Declaratory Judgments Act passed by Congress in June, 1934. Rather, I am attempting to deal mainly with the question of how and when a statute, or act of state officers or employees pursuant thereto, may be challenged as to constitutionality in a declaratory judgment action. I am confident that all of you are more or less familiar with the vari-

ous declaratory judgment acts now in force in this country, although they are of recent origin as compared with our better known forms of action. When I began preparation of this paper, I found quite quickly that neither my knowledge or experience saved me from considerable investigation which I had not expected would be necessary when I promised in February to make an address in August.

Now that I have accumulated considerable information and knowledge on the subject, I find it quite impossible as well as inadvisable to express in the short compass of time at my will and disposal the result of my investigation and the acquisition of knowledge pursuant thereto.

For a considerable number of years in this country declaratory judgments were frequently confused with advisory opinions, and as I recall at least one or two courts refused to entertain a declaration for a judgment because they construed the act as requiring an advisory opinion. Happily this misconception has now disappeared since the objectives of the declaratory judgment acts have been more clearly seen and understood. A prayer for a declaration is not a request for an advisory opinion, neither is it an application for a coercive decree found in those extraordinary remedies which are usually associated with the consideration of whether or not acts of the legislature are constitutional.

Probably the greatest recognition of and impetus given to the use of this form of action resulted from the decision of the Supreme Court of the United States in the case of *Nashville, Chattanooga, and St. Louis Railway vs. Wallace*, 288 U. S. 249, decided at October Term, 1932. That case was an appeal from the Supreme Court of Tennessee, and involved the constitutionality of a state tax statute. The State of Tennessee had enacted the Uniform Declaratory Judgment Act in 1923, and its supreme court had fully recognized its place and function in that jurisdiction. When this case reached the Supreme Court of the United States, there was some doubt as to whether or not the court was going to entertain the appeal because the judgment was of a declaratory nature under the Tennessee statute, and former opinions of the Supreme Court had not recognized such form of action.

However, Mr. Justice Stone, writing the very lucid opinion, marched past the old cases on the subject and recognized the place of

declaratory judgments. In his opinion he said:

"The issues raised here are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystalize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical controversy, which is finally determined by the judgment below. See *Old Colony Trust Co. v. Commissioner of Internal Revenue*, supra (279 U. S. 724, 73 L. ed. 925, 49 S. Ct. 499). As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial."

Thereafter in June, 1934, the efforts of Honorable A. J. Montague, Member of Congress from Virginia, made since 1919, were rewarded with the passage by Congress of the Federal Act. This Act is not in form like any of the state acts or like the Uniform Act, but, nevertheless, it appears in substance about the same, and with minor differences in its administration would seem quite comparable. The Act is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Judicial Code, approved March 3, 1911, is hereby amended by adding after section 274C thereof a new section to be numbered 274D, as follows:

"Sec. 274D. (1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

A very informative article on this Act may be found in the issue of the Virginia Law Review for November, 1934. The recent case of *Penn. v. Glenn*, 10 Fed. Sup. 483, from W. I. Kentucky, deals with Tobacco Control Act, and holds Federal Declaratory Judgment Act applicable and the Tobacco Control Act unconstitutional. Of course, the Act is too recent to have yet produced any reported cases, but some appear to be on the way among the numerous so-called processing tax suits recently instituted. There may be others with which I am not familiar.

The Uniform Act adopted by many states can be found in Volume 9, Uniform Laws, Annotated, together with citations of cases.

Need for the Declaratory Judgment Form of Action.

Two cases that illustrated the need for such a form of action were the *Piedmont & Northern Railway Co. vs. United States*, 280 U. S. 469, and *Willing vs. Chicago Auditorium Assn.*, 277 U. S. 274. The first case went from my own State of North Carolina in 1928. The Piedmont and Northern Railway, which was operating interurban lines in North Carolina and also in South Carolina, undertook to connect its lines. Immediately controversy arose as to whether or not this was an interurban electric line, not coming within the class of those railroads requiring a certificate of public convenience and necessary from the Interstate Commerce Commission, or whether it did come within the section of the Interstate Commerce Act requiring such a certificate. The railway company, apprehensive of the penalties that might follow, dared not proceed without a certificate of convenience and necessity, applied to the Interstate Commerce Commission for such certificate, and, at the same time, denied the Commission's jurisdiction. The Commission very promptly took jurisdiction and denied the application. The railway thereupon set about to overrule the order of the Commission. When it finally got to the Supreme Court of the United States with its case, it was told that if the Commission had jurisdiction, its order denying the certificate denied no right of the railway and was not subject to judicial review, and that, on the other hand, if the Commission did not have jurisdiction, the order was nugatory and unreviewable. The real question was whether the company was an interstate or interurban railway, but there seemed no way to bring this question before the court for judicial determination, except by running the risk of criminal prosecution or governmental injunction and the heavy expenses incident thereto, together with the loss of time and the loss of funds that might be spent in such premature adventure without a certificate.

The company thereupon started construction of the extension and was enjoined, and with another trip to the Supreme Court of the United States, found that it was an interstate railway and within the jurisdiction of the Interstate Commerce Commission and, therefore, could not lay the tracks necessary to connect the two ends of its lines. If the Federal Declaratory Judgment Act had been in effect at that time, or if the court would

at that time have recognized the right to have proceeded by declaration, then the railway company would have found out in two years instead of four what its rights were, without the very great expense and loss of time incident to the efforts which were made to ascertain its real character. The company had to take the risk of an overt act and start construction, before it could get a judicial determination of its rights.

In the *Willing* case it was necessary for some of the parties desiring to ascertain what their rights were to proceed with overt acts before it could get before the court for judicial determination the construction of a ninety-nine year lease between the various parties involved in that litigation. Such a judicial determination would have been speedy and effective by way of a declaratory judgment action, and without the expense attendant upon overt acts that might have been prejudicial in other ways to the rights of the party desiring to secure such judicial determination.

I have mentioned these cases, not because they involve exactly the question which I have proposed to discuss, but, rather, because they are outstanding examples of the inefficiency and insufficiency of our old forms of actions in many cases and under many circumstances. It is quite interesting to contemplate the courts' attitude in such cases, when we remember that really declaratory judgments are in themselves nothing new to our jurisprudence. Judgments in cases involving the construction of wills, deeds and other instruments, and where there were no coercive decrees granted, have been nothing in reality but declaratory judgments. The growth of the form of action in Australia, in England since 1883, and in the United States since 1919 demonstrates its value as a form for securing an economical and expeditious method of judicial determination of many issues that arise.

Real Controversy and Real Parties in Proper Jurisdiction.

Declaratory judgment actions require the presence of a *Real Controversy*, between *Real Parties* and with the *Proper Parties*. Their objective is to determine judicially such issues as lie within their province before overt acts have breached contracts, violated statutes, and misinterpreted instruments and laws with the attending perils. The Declaratory Judgment Act says to such parties, with such controversies, that they may lay the questions involved before a court for judicial determination, and that in such an action the

complaining party may or may not ask for coercive action, such as is usually requested in cases of mandamus and injunction. Furthermore, there are provisions in most if not all of the Declaratory Judgment Acts in this country that provide for supplemental relief. A court may declare the rights of the parties and thereafter, if it should appear necessary to carry into effect the benefit of such a declaration, the court would be authorized to grant an injunction or mandamus as an appropriate coercive order. Such supplemental relief, of course, will be needed rarely because none but the foolhardy would attempt to evade the declaration of the court under such circumstances.

It is, of course, needless to mention the fact that in all actions for a declaratory judgment there must be jurisdiction in the court before which the declaration is asked. In the Federal Court, under the Federal Act, there must be present the requisite jurisdictional facts. In the Federal Courts, if an injunction is asked in a case that now requires the action of a three judge court under Section 266 of the Judicial Code, then, of course, a District Court could not act on an application for such injunction. If no injunction is asked, it would seem that the District Court can act on the request for a declaration.

Alternative Remedy Not Affected by Other Remedies.

In many, if not most of the processing tax suits recently instituted, lawyers have asked for a declaration under the Declaratory Judgment Act in addition to relief by way of an injunction. Such prayers are not at all inconsistent, because it is conceivable that the court might for good reasons before it refuse to grant an injunction but then go ahead and determine the issue of whether or not the act in question is constitutional. It would appear from a consideration of the purpose and object of the Declaratory Judgment Act that even though the court should hold that it was prohibited from granting an injunction restraining the collection of the tax, that nevertheless it might proceed under the prayer for declaration and decide the constitutional question. If the act could have been challenged in the beginning in such a manner by asking a declaration, which of course it could not, because the Federal Act had not at that time been passed, we have no difficulty in visualizing the lack of the present and prospective confusion growing out of

these many suits. But, then, there is the bright side of the picture. In the present circumstances the lawyers stand a chance to share with the farmers in the benefit of the act that is being questioned.

*Questioning the Constitutionality of
Tax Laws.*

This has always been the favorite sport of those fortunate enough to be invited by their clients into such select company. The Supreme Court of Indiana in the case of *Zoercher vs. Agler*, decided on July 2, 1930, reported at the 172 N. E. 186, recognized the right of tax payers of the City of South Bend to raise the constitutional question, in that case by way of a request for a declaratory judgment. The state statute was held constitutional, but the parties interested did at least have the satisfaction of knowing their rights promptly.

So, as Professor Borchard says:

"The simplest way is the best way to bring to judicial determination the challenged validity of governmental action allegedly violating individual rights; and experience has shown that the declaratory judgment serves that purpose admirably. The disadvantage of not having available such form of procedure and relief is illustrated in such cases as *Shredded Wheat Co. v. City of Elgin*, where the plaintiff sought to enjoin as unconstitutional the enforcement of a municipal ordinance which required it under penalty to pay a heavy license tax as a condition of selling in the city a product coming into the city in interstate commerce. The court refused to pass upon the ordinance until the plaintiff had purported to violate it by selling its product without paying the tax and until a prosecution for the penalty had been begun. If invalid, said the court, the prosecution would fail and the plaintiff would not be injured; if valid, there was no ground on which its enforcement should be enjoined. To determine whether the law is a trap, whether the offering is mushroom or toadstool, the bait must first be eaten! So, Dreiser was unable to obtain a determination against his publishers, the John Lane Co., whether "The Genius" violated the criminal law, until the publishers had actually issued the book, something they declined to do in the face of a possible criminal penalty."

Quite similar is a case which came into my office only last week. At the recent session of the North Carolina General Assembly a tax of ten cents per pound was placed upon the sale of oleomargarine containing foreign oils. Manufacturers generally used coconut oil instead of cotton seed oil prior to the passage of this act. The legislators being patriotic persons, and remembering that cotton grew abundantly in North Carolina, while nowhere was to be seen the semblance of a coconut tree, passed the act in question. If my client undertook to sell the product containing coconut oil, which, some say, is probably a better product than cotton seed oil will make, it runs the risk of violating the law and suffering heavy penalties therefor, including indictment, fines, and prison sentences. These penalties are to be inflicted upon those retailers in North Carolina who sell such a product without paying the prohibitive tax. You can readily realize that no retailer worth doing business with is going to undertake to sell such a product and risk the heavy penalties that may flow therefrom. None of them wish to offer themselves as a sacrifice to test the law by way of indictment in the criminal courts. Nor does the manufacturer wish to have to pay the tax for the various dealers and sue to recover as is provided for by our state laws. If it knew today whether or not the law was constitutional, it could determine whether it should continue to sell its superior product made with coconut oil or whether it should bow to the patriotic fervor and replace coconut oil with cotton seed oil. With the Declaratory Judgment Act in North Carolina, which we have had for only a few years, it will now be possible to test the constitutionality of that statute promptly and efficiently and also economically.

Should not a citizen who wishes to obey the law and be within its provisions, many of which are oftentimes confusing and confounding, have an opportunity of knowing in advance whether or not an act he proposes to do in good faith will subject him to the penalties of the criminal laws? There is a difference between crimes *malum in se* and *malum prohibitum*. Thousands of acts are now declared to be crimes in this country that are not *per se* criminal, and a citizen who wishes to obey the law should have, and in most states now does have, an opportunity of testing certain such questions by way of a declaratory judgment action.

Some of the courts have been grudging in

their recognition of declaratory judgment actions, a notable case of which is *Bell Telephone Company vs. Lewis*, 313 Pa. 374, where the telephone company wished to lay its lines across a state owned bridge, and was confronted with a statute that required utility companies to procure from the governor a license, and that license subject to revocation on six months' notice. The company claimed that the provision requiring approval of the governor and also making the license revocable was unconstitutional, and asked for a declaratory judgment of its right to lay its lines free from these conditions.

Professor Borchard in commenting on this case says:

"In denying jurisdiction, the court considered this (1) an action against the state, (2) that judgment could be enforced against the governor only by mandamus, and mandamus did not lay against him, and (3) that mandamus against secretary of department of highways was a statutory remedy and should have been employed. All three grounds seem destitute of foundation. (1) Constitutionality is always tested by an action against a state officer, and is not considered, even in Pennsylvania, an unpermissible action against the state; (2) petitioner needed no mandamus against governor, but only a negative declaration that his approval of license was not necessary or that license was not revocable; (3) the declaration is not an exclusive remedy, but alternative, and mandamus is a general remedy and not that peculiar statutory remedy for the special case which bars declaratory relief. A declaratory judgment seems to have been the ideal form of relief needed in the case, and should have been granted. The jurisdictional dismissal was most unfortunate. See 82 U. of Pa. L. Rev. 544 (1934)."

Another case that might be of interest to parties who are from time to time summoned to appear before commissions, committees and such bodies constituted by legislative enactment, is the case of *Colonial Sugar Refining Company vs. Attorney-General for the Commonwealth*, 15 C. L. R. 182, decided in 1912. In that case plaintiff contended that a certain statute was ultra vires and void and that he could not be required to attend sessions and give evidence. The year before, plaintiff's manager had been required to appear before a commission and had refused to

answer questions and had been fined. When another investigation was proposed, plaintiff immediately sought to ascertain his rights under the Declaratory Judgment Act. If Congress will now name its men for the next investigation beginning six or eight months hence and then adjourn, doubtless some of our citizens would be prompted to try to ascertain their rights without risking a jail sentence or without divulging information that they consider they have a constitutional right to keep unto themselves.

Determination of the Duty and Liability of Public Officer.

In this field the declaratory judgment acts may be used to good advantage. Frequently a public officer will find himself in a position where if he refuses to act under a statute he believes to be unconstitutional, he may find himself sued in an action in court, removed from office, or suffer even other penalties, or if he proceeds under the statute, he may be confronted with a suit for damages or other penalties. Our public officers find themselves faced with such risks, and even though in some of these cases mandamus may be resorted to, yet the officer who is the objective of the mandamus may not be able to raise in a particular case the question of whether or not the particular statute involved is unconstitutional. By proceeding by way of declaratory judgment action he might be relieved in many cases of the peril that otherwise would accompany his actions, regardless of which way he proceeded.

Validity of Zoning Statutes and Ordinances.

Frequently conditions arise where property owners may wish to test the constitutionality of a statute providing for zoning ordinances or test the authority of the officers acting pursuant thereto. A declaratory judgment action is sometimes the ideal method of ascertaining a client's rights in such cases. Frequently property owners have avoided expensive litigation and virtual confiscation of their property by resorting to such an inexpensive and efficient form of action. Questions may be and, in fact, have been raised in declaratory judgment actions in such cases.

Cases of Particular Interest to Insurance Companies.

In the use of the various declaratory judgment acts in this country insurance companies have also had their part, sometimes probably reluctantly, but I dare say that for the most part they have been and should be eager to

avail themselves of the opportunities of having declared their rights in various situations that from time to time arise. I have not attempted until now to discuss just the application of declaratory judgment acts to insurance companies. I assume it is needless now to go into detail. However, it may be of interest to you to have pointed out a few of the cases in which questions involving insurance companies have been passed upon by the courts in declaratory judgment actions. In *Northwestern National Insurance Company vs. Freedy*, 201 Wis. 51, the question of whether or not the insurance company had the privilege to organize a casualty insurance subsidiary was passed upon. In *National Reserve Life Insurance Company vs. Moore*, 114 Kan. 456, the question was presented in 1923 as to whether or not the company was privileged to use some of its reserve funds with which to erect an office building. In *Bank Savings Life Insurance Company vs. Baker*, 120 Kan. 756, there was raised and determined the question of whether or not the insurance company was privileged to forfeit policies under a statute pursuant to which it desired to act. In 1916 the Australian Mutual Provident Society instituted an action against the Attorney-General of that Commonwealth to ascertain whether or not it had the right to issue policies on the lives of children, making those policies payable to the parents of such children. The company believed that the issuance of such policies was within the restrictions of the governing statute. The Attorney-General took the opposite view. The matter was brought before the court on a request for a declaration of validity. The court held that one of the statutory conditions had not been met and that such a policy was illegal. Certainly such a use justifies the existence of a declaratory judgment act in that commonwealth. It prevented the issuance in good faith of a great many policies, the form of which would have been illegal on the holding of the court in that commonwealth.

Sometimes the purpose of the declaratory judgment form of action is misunderstood, as was the case in *Green vs. Casualty Co.*, 203 N. C. 767, where the cause of action on a disability policy had arisen and claim made for payments during disability. Our court held that the case was not one for a declaratory judgment. While there are many cases arising that will justify asking for a declaratory judgment, yet there are others for which

this form of action is not proper. A careful consideration of the problem in each case will indicate whether or not such a judgment should be sought.

Problems Affecting Insurance Companies Which Might Be Presented For Determination Under Declaratory Judgment Acts.

Are there not many questions arising every day in the administration of insurance business that perplex both the executive heads and the general counsel of insurance companies? Let us examine for a few moments some of the provisions of state statutes about which there may be considerable argument as to their constitutionality. Consider whether or not such questions of constitutionality could not be raised and determined in declaratory judgment actions. I realize that prophecy is dangerous to the prophet, and frequently without virtue. However, may not some of these situations be met by insurance companies with requests for declaratory judgments?

(a) If I mistake not, the insurance laws of some of the states provide for discrimination between salaried and commission agents of insurance companies.

(b) As I recall, some state statutes provide for limitations upon the amount of commissions which may be paid by resident agents to non-resident agents and require non-resident agents to be qualified under the laws of the state of the resident agent, regardless of whether or not such a non-resident agent ever has come into or ever expects to be within the boundaries of that state.

(c) We are familiar with requirements of some state statutes as to the counter signature of policies on risks written outside of the state, and where no actions or negotiations incident to the acquisition of the risk or the writing of the policy has been performed within the state.

(d) In some states there are requirements that an application for insurance license has to be certified by the agent's company to the effect that the agent is a resident of the state and also has the further intention of remaining a resident for at least twelve months.

(e) The question of the constitutionality of a state statute fixing a heavy penalty per day against an insurance company that fails to settle claims within a short specified time. There have been, and doubtless will be, cases where an insurance company might test the

validity of such acts by a declaratory judgment action, and with the least possible jeopardy to itself.

(f) Oppressive and unfair rules and orders of Insurance Commissioners, if any should ever appear, might be tested, as to their validity, and the peril of non-observance obviated, by such an action.

(g) Compulsory statutory policy provisions, and attempted retroactive features in statutes.

(h) Questions of interpretation of statutory bonds, and similar instruments.

To these questions might be added many more that have occurred to you.

Courts will doubtless welcome such actions where the question involved can be determined without a long drawn out trial, with a horde

of witnesses and a mass of evidence. All of us are familiar with such cases and know how frequently a due consideration in advance of the constitutional question involved, by a simple and direct declaratory judgment action, might render unnecessary a tedious trial with unnecessary issues of fact. Intelligent litigants will appreciate the use of this new form of action, and lawyers who become thoroughly familiar with the underlying principles should be able to use it frequently to good advantage, and sometimes to their clients' satisfaction. The basic idea is not new, but rather is old and has been used in many ways, under different names for many years. May I commend it to you for your conservative consideration.

The Liability of the Insurance Company When It Takes Full Charge of the Investigation and Defense

By ROBERT L. WEBB
of Topeka, Kansas

When the Company Takes Full Charge of the Investigation and Defense.

THIS title necessarily applies to casualty insurance and usually in those cases where the rights of third parties are involved.

The contract usually contains a provision that:

"The company will investigate all accidents and at its own expense will employ attorneys to represent the assured in all suits brought against the assured whether groundless or not, and in event of a judgment rendered against the assured then the company will pay the same to an amount not exceeding the limits stated in the policy."

This is one provision which confers certain benefits on each of the contracting parties, and for its share the insurance company sometimes pays dearly.

These contracts contain a further clause which in substance provides that:

"Upon the occurrence of any loss or accident (irrespective of whether any injury or damage is apparent at the time) the assured shall give immediate written notice to the company with full information; and if a claim is made on account of such accident, the assured shall give like immediate

notice with full particulars; and if any suit is brought against assured he will immediately forward every summons or process and will aid in securing information and evidence and the attendance of witnesses at the trial. He shall be present at the trial and if requested shall testify and shall at all times render all possible cooperation and assistance."

And they usually contain the further provision:

"The assured shall not voluntarily assume any liability, or, without the written consent of the company, incur any expense, or interfere in any negotiations for settlement or in any legal proceedings conducted by the company."

These last two clauses have many times been declared to be valid provisions, by some courts referred to as "material conditions of the policy, the violation of which by the assured forfeits his right to claim indemnity thereunder," and by others as "conditions precedent," the violation of which ordinarily will constitute a defense to liability.

While the courts have gone the limit to protect the injured plaintiff, giving him the benefit of the company's waiver of a forfeiture,

they have with equal force charged against the injured party the assured's violation of the policy;¹ and have held that the insurer's liability to the injured party at all times depends upon its liability to the insured.²

*The Company May Waive Its Defenses
Against the Assured.*

Having taken full charge of the investigation of the claim and complete charge of the defense, the insurance company has established a very definite relation with the assured.

There can be no argument about the fact that this kind of a carrier may waive, or may estop itself from asserting, violations of the contract which in the first instance would forfeit the assured's right to protection thereunder. This is an early doctrine in insurance law and has been invoked by the courts in every state, by the United States courts, as well as by the courts of Canada.

On this subject the Kansas court has said:

"It is universally recognized that a provision in a policy that a breach of warranty shall avoid the policy is inserted for the benefit of the insurer and may be waived by it, as well *after* as before a forfeiture has been incurred, and that no new consideration is essential to support such a waiver,"³

and in the same case, quoting with approval from an Illinois case, the rule is stated:

"It is well settled that if it (the company) should subsequently recognize the policy as still subsisting, and should treat with the assured in a manner inconsistent with the insistence that the policy has become forfeited, and in such a manner as to indicate that it was not its intention to claim that the policy has lost its vitality, a case would be presented justifying the conclusion that the company had waived the right to insist upon a forfeiture."

In a Pennsylvania case⁴, at the time the action was brought the company had notice that the assured would not attend the trial and at that time it knew all of the facts which it later relied upon as establishing assured's breach of the cooperation clause. The company did not disclaim liability and in fact did not discuss the matter with the assured even

by suggesting that he might engage counsel on his own behalf, but continued in the defense of the case. This court said that the company had estopped itself from relying on the breach.

The Vermont court⁵ stated the rule as follows:

"It has come to be well established in the law of insurance that forfeitures of policy contracts are not favored, and that, to avert the same, courts are always prompt to lay hold of any circumstance that indicates an election to waive a forfeiture already incurred. So it is that an insurer who, with full knowledge, elects not to take advantage of a forfeiture, is thereby bound to treat the contract as if no cause of forfeiture had occurred."

In a case from Utah before the Circuit Court of Appeals for the Tenth Circuit⁶, the policy contained the usual provisions. The court found that the company took full charge of the assured's defense, filed motion for new trial, all without notice up to that time that the assured had done anything which the company claimed would violate the policy and that long before they asserted a violation counsel were fully apprised of all facts upon which they later relied as a defense. After commenting upon the fact that the defenses suggested by the insurance company were trivial, the court held that the insurance company was estopped to raise these defenses, and used the following language:

"The right fully exercised by the insurer to the exclusion of the assured, produced the liability of the insurer. * * *"

This general rule holding the insurance company to a waiver or perhaps more strictly speaking to an estoppel of its setting up what might have been defenses after it has taken complete charge in the defense of the main action has been recognized by nearly all, if not all, of the courts; and the situation in which counsel for the insurance company often finds himself is well stated by a Canadian court⁷ in the following language:

¹Hoff vs. St. Paul-Mercury Indemnity Company, 74 F. (2d) 689.

²Wainer vs. Weiner, 192 N. E. 497.

³Mayse vs. Gt. Am. Ins. Co. 256 Pac. 799.

⁴Moses vs. Ferrel, 97 Pa. Super. Ct. 13.

⁵Francis vs. London Guarantee & Accident Co., 138 Atl. 780.

⁶New Jersey Fidelity and Plate Glass Insurance Company vs. McGillis, 42 F. (2d) 789.

⁷Cadeddu vs. Mt. Royal Assur. Co., 41 B. C. 110, 2 D. L. R. 867.

"Once the breach came to the knowledge of the appellant (insurer), it had to take a stand. The solicitor, by continuing to defend after knowledge, could only do so on the assumption that the policy was valid and subsisting. It was a representation by acts, that the appellant would assume any judgment obtained within the limits of the policy. The solicitor's right to act at all only arose on the basis that the claim was within the policy unless there was an additional retainer from the respondent (assured) to act for him also. Election may be by words or acts. * * *

"I do not of course criticize the solicitor. He was possibly in doubt as to whether or not there was a breach, and did not like to leave respondent to his own resources, and was further influenced by the fact that he might succeed in defending the action in any event. But we are dealing with legal implications."

This is one of those moments which adds zest and thrill to the life of a practitioner. He holds in his hands the fate of his client. He must choose his course. If he stay in the case, he gives up what may have been a good defense, and if he then lose the case, his client may damn him for giving it away. If he withdraw from the case and stake everything upon the assured's breach and, if that fail, his client may damn him for not making a defense on the merits. It is a situation where a lawyer is forced to gamble on his client's case with a great probability that he will be damned if he does and damned if he doesn't.

The Waiver Benefits the Injured Party.

It hardly need be said that when the courts hold that the company has estopped itself from asserting a forfeiture the doctrine applies as well for the benefit of the injured party as for the benefit of the assured.

In a decision by the Massachusetts Court⁹, holding that the company was estopped from setting up defenses of forfeiture, the court assumed that the plaintiff in this case had no greater rights than the assured would have but permitted direct recovery in the name of the injured party on account of the estoppel of the insurance company.

The doctrine is reiterated in cases from many other courts.¹⁰

⁹Daly vs. Employers' Liability Assurance Corp., Ltd., 168 N. E. 111.

¹⁰United States Fidelity and Guaranty Co. vs. Remond, 129 So. 15.

This question of direct suit is discussed in detail in an action which went up from Texas to the Circuit Court of Appeals for the Fifth Circuit¹¹ decided in January, 1935, in which the court says:

"Whether appellee, the injured third party and judgment creditor, can also maintain an action upon the policy presents a question which, so far as we are advised, has not been decided in any reported case in an action by one in appellee's position upon this particular kind of policy. * * * If the action is without precedent, it but undertakes to make a new application of an old, established principle of law. * * *

"The policy nowhere provides that an injured person may not sue the insurer to enforce payment of his judgment. The conclusion is inescapable, as it seems to us, that appellant's policy confers a benefit upon an injured person who recovers a judgment against the assured in an action for damages coming within its provisions. * * *

"A promise to discharge the promisee's duty creates a duty of the promisor to the creditor beneficiary to perform the promise." Restatement, Contracts, Para. 136. * * *

"And this is so, although the primary purpose of the parties to the contract was to benefit themselves. Byram Lumber Co. vs. Page, 109 Conn. 256, 146 A. 293. In such a case the third party need not be known or know of the contract at the time it is entered into; it is sufficient that he can be identified and is able to establish the fact that he is a beneficiary. Whitehead vs. Burgess, 61 N. J. Law, 75, 38 A. 802."

thus closely approaching the doctrine announced in Lawrence vs. Fox.

In a Kansas case¹², judgment was rendered in favor of the injured party and, receiving no satisfaction, garnishment process issued against the insurance carrier which answered that it was not indebted to the assured. The company contended that the assured had not complied with the policy condition requiring the assured to cooperate in the defense of the suit. Before the case was tried, the assured became insolvent and disappeared. He took no part in the trial and his whereabouts were unknown to any of the parties. However, the

¹¹Ohio Casualty Insurance Company vs. Beckwith, 74 F. (2d) 75.

¹²Brandon vs. St. Paul-Mercury Indemnity Co., 294 Pac. 881.

lawyer who acted not only for him but for the insurance company procured a number of continuances of the case at a time when he knew that the assured had departed. Thereafter, substantial offers of settlement were made by the company's lawyer both before and after the garnishment hearing.

After confirming the plaintiff's right to garnishment the Court said:

"The company, it appears, had made its defense to the claim for damages in the action of Brandon vs. Woods, (the tort action) and did so in the name of Woods (the assured), as the policy provided that it might do. The judgment in favor of plaintiff had been entered and had become a finality before the garnishment proceeding was commenced. *The questions as to the right of recovery were settled in that action. If there was any question as to failure of Woods (the assured) to give prompt notice of the accident and to assist the company in the defense, which could be regarded as still open to the company, it was determined in that judgment.*"

*Exceptions to the Rule.
Ignorance of Facts.*

While the general rule is that when the insurance company assumes full charge of the defense of a claim it will not thereafter be heard to say that it has no liability to the assured, yet in line with the doctrines of estoppel and waiver the courts have said that the insurance company has not waived the defense caused by a breach of the policy if in fact the company exercised good faith, did not know of the true facts at the time it assumed the defense, and having learned those facts promptly notified the assured of its denial of liability. This exception has been applied in a number of cases where the assured not only has withheld certain facts until the trial of the case, but of course in those cases where the assured has wilfully mis-stated the facts¹²; and the general rule is stated to be that:

"In order to charge insurer with waiver of a forfeiture from his acts acknowledging the validity of the policy it must be shown that he at the time of the alleged waiver had knowledge of the facts constituting the forfeiture."¹³

¹²Hermance vs. Globe Indemnity Company, 223 N. Y. Supp. 93.

¹³Glens Falls Portland Cement Company vs. Travelers Ins. Co., 42 N. Y. Supp. 285.

As is said in a Minnesota case¹⁴:

"Nor can estoppel or waiver be invoked here, for the insurer did not take up and conduct the defense knowing that * * * (assured) was driving while intoxicated; on the contrary, when it learned of the claim, it went to * * * (assured) for information, and his denial induced its continuance of the defense."

Another case¹⁵ involved a policy which provided that the company would not be liable if the car were driven by any person under the age of eighteen years unless accompanied by a duly licensed chauffeur. The fact was that the companion not only was not a duly licensed chauffeur, but was himself under eighteen years of age at the time of the accident. The insurance company relied upon representations made by assured and not until the driver was on the witness stand did it develop that he was in fact driving the car in violation of the law. To the suggestion of the assured that the insurance company by diligent investigation might have learned the true facts, the court said:

"The fair answer to that proposition is that the assured represented to the insurer that Wilson was a duly licensed chauffeur, the plaintiff cannot take advantage of the defendant's reliance upon such representation."

Constructive Notice.

To the general rule by which the courts have applied the doctrine of waiver or estoppel, some if not a majority of the courts have added that the insurance company estops itself from asserting a violation if, although it does not have actual knowledge, it does have information sufficient to put it upon inquiry. Of course, this is only another way of saying that the insurance company must at all times exercise good faith in conducting its inquiry to ascertain the true facts. But in speaking of a violation of the sole ownership clause the Pennsylvania Court¹⁶ said:

"When an insurance company or its representative is notified of loss occurring under an indemnity policy, it becomes its duty

¹⁴Humphrey vs. Polski, 200 N. W. 812.

¹⁵Morrison vs. Royal Indemnity Co., 137 N. Y. Supp. 732.

¹⁶Malley vs. American Indemnity Corporation, 146 Atl. 571.

immediately to investigate all the facts in connection with the supposed as well as any possible defense on the policy. It cannot play fast and loose, taking a chance in the hope of winning, and, if the results are adverse, take advantage of a *defect* in the policy. * * *

"With a little diligence and within a brief time, the carrier could have procured the exact knowledge on which it now relies, and in most cases may similarly prepare a defense. Here an inquiry from public officials, at the state capital, would have revealed plaintiff's exact relation with regard to ownership. * * *

"* * * once having made its decision, the rights of others in relation thereto cannot be prejudiced."

A declaration of this kind makes it incumbent upon the insurance company to anticipate that in every case there probably is a breach of some warranty of the policy. It would seem that the company should be chargeable with constructive notice of all facts of which it has sufficient information to put it upon inquiry, but not in those cases where it has acted in good faith, has no such information, and cannot obtain it unless it assumes at the outset that at some place along the line there has been a breach requiring the company to make investigation and examination into the most minute details.

Again, in a case decided by the Court of Appeals of New York¹, the insurance company assumed defense and at the trial and for the first time the company's lawyer was advised by the plaintiff's lawyer that the assured's car was being driven in violation of the state law as to age of the driver, whereupon the company abandoned the defense. The trial court held with the company and the appellate court reversed the decision, holding that as a matter of law the company had sufficient knowledge to put it upon inquiry as to the chauffeur's true age.

The age of eighteen satisfied the statute. The insured had furnished the company with a statement made by the chauffeur in which he represented that he was eighteen years old. Thereafter, the chauffeur represented to the company's investigator that he was twenty years old, and the company acted upon that statement until the day of the trial when it learned the true facts.

¹S. & E. Motor Hire Corp. vs. New York Indemnity Co., 174 N. E. 65.

The attitude of the Court of Appeals seems quite different from that of the Pennsylvania court. Speaking of the company's constructive knowledge respecting the age of the chauffeur, the New York Court says:

"When the insurance company was called upon to defend the action which was brought against the assured, it was not bound to inquire whether the law was violated before it undertook the defense, especially where the assured furnished the company with an affidavit from the operator stating that he was eighteen years of age * * *. Upon the information furnished to the insurer, it would have breached its contract if it would have failed to defend the suit."

Other interesting cases are those which indicate a desire on the part of the assured to cooperate not with the insurance company, but with the injured party. In a New York case² guests of the assured were injured in the collision and recovered judgment. The assured was insolvent and actions thereupon were brought directly against the insurance company pursuant to the New York statute. The insurance company defended on the ground that the assured had not only failed to cooperate, but had aided the injured parties in recovering their judgments. The assured had been charged with fast driving. In his affidavit furnished to the insurance company, he stated that he did not drive faster than twenty-five miles per hour and that no one in the car complained to him about driving too fast, and no remarks were made to him regarding his driving. At the time of his trial and just before he was to be called as a witness, the assured suddenly lost his memory and could not recall the speed at which he was driving, nor could he remember whether or not he had been warned by any of the passengers. As a result of this, the insurance company did not call him to testify.

In the action by the injured parties against the insurance company the trial court took this question from the jury and directed a verdict in favor of the plaintiffs. This judgment was reversed by the Court of Appeals in an opinion in which it is said:

"We think it was a question for the jury whether Wasserman had actually forgotten or whether he was feigning, falsifying, and wilfully trying to help the plaintiffs to re-

²Seltzer vs. Indemnity Co. of North America, 169 N. E. 403.

cover against him * * *. To be plain, it is a question for the jury to say whether Wasserman was deliberately aiding the plaintiffs to get their money out of the insurance company * * *. "There was no waiver as matter of law. At the time the insurance company undertook the defense. it had Wasserman's affidavit."

Reservation of Rights

Where, however, the insurer reserves its rights under the terms of the policy and the insured consents to such a reservation either expressly or by clear implication, then the insurer's assumption of the defense does not amount to a waiver of a former breach or of grounds for forfeiture. But if upon a notice of a reservation of rights the assured dissents or objects to the conditions sought to be imposed by the insurer, and thereafter the insurer assumes or continues in the defense, then the effect of such conduct is the same as if no reservation of rights had ever been suggested. Unless the liability of the insurance company can be definitely determined before the trial of the tort action, as was discussed by Mr. DeJarnette at the last convention, then the insurance company, when it meets the question of violation of the policy, must seek to fortify itself by way of reservation of rights or non-waiver agreement. These agreements either by way of formal document or by letter, or even by oral conversation have been sustained by the courts and recognized as proper. One of the early cases on this subject was decided by the Court of Appeals of New York²⁰ more than twenty years ago. This case involved an employer's liability policy and specifically excepted loss resulting from injuries to any person employed in violation of law.

The particular question involved was the age of the injured boy. The employer had been advised by the boy's father that the boy was sixteen years of age, but after the injury, claim was made on account of the fact that he was only fifteen and that no certificate as required by the statute had been secured permitting him to work. Thereafter suit was filed in which the complainant alleged that he was only fifteen and ultimately judgment was rendered against the employer which the insurance company refused to pay.

When claim was made, there was some discussion between the insurance company

and the employer with respect to the boy's age, at which time the employer satisfied the insurer that the boy was sixteen. Shortly after suit was filed the matter was again discussed and the employer was advised by the insurer that the policy did not cover the claim if the claimant was in fact employed in violation of law and that if at the trial it developed that the injured was employed contrary to law. "This case would not fall to us for attention."

The matter being called to the attention of an agent of the company, he advised the assured that this notice was purely a formal matter and that the company was going to take care of the case.

Thereafter, the insurance company's further investigation disclosed that the boy was only fifteen at the time of the injury. Whereupon, the insurer advised the insured in substance that it appeared that the boy had been employed in violation of law, that the case was a dangerous one, that a settlement should be made, and that the assured should contribute toward a settlement. The assured refused to make any contribution and told the company's manager that he would expect the company to take care of the case. The company conducted the defense with the cooperation of the assured's counsel. In discussing the question of waiver, the court said:

"When the employee made his claim for damages against the insured * * *, the insurer had a choice between two courses of action which would preserve the limitation on its liability * * * it could refuse to defend or * * * it could proceed with the defense * * * with an understanding with or notice to the insured, express or implied, that it would defend * * * and that if in the end it should come out that the only allegation sustained was the one of violation of law its rights should be preserved, and it should not be liable.

"It could hardly be expected that the respondent would take the first course. * * * Under such circumstances, I think that the insurer, as a matter of safety to itself and of fairness to the insured, was bound to undertake the defense of the action for the benefit of both and of each. * * * Of course, there is no method by which it could compel the assured to make an explicit agreement of the kind above suggested * * *. All it could or was bound to do

²⁰Mason-Henry Press vs. Aetna Life Ins. Co., 105 N. E. 826.

was to fairly and reasonably assert its rights under the policy in such a manner as would be notice to the insured that it did not intend to waive its rights by proceeding with the defense of the action. This it did and * * * it is impossible to see how the respondent ever indicated any waiver of its rights or ever so misled the insured that it is now estopped from asserting those rights."

Many courts have cited this decision as leading authority on the subject of reservations by the insurer.

In an Ohio case²¹, the insurer obtained assured's written statement detailing the circumstances of the collision, in which the assured stated that he was nowise at fault; that the fault was entirely on the part of the other party. At the same time, the company took a signed statement from the assured reciting that although the insurance company disclaimed liability to him, it was to investigate and to defend the claim, reserving the right to be liable only for the risks assumed by the policy.

Thereafter, the company twice wrote the assured reminding him that the case was pending, calling his attention to the cooperation clause, and asking that he go at once to the office of the Company's lawyers for conference. He made no response to these letters, and was not present at the trial. His excuse was that he had left the address to which the letters were sent and he did not receive them until too late, although receipts for these registered letters had been returned to the company signed by the assured's representative. The assured admitted that he had told the insurance company that he would keep it advised of his whereabouts, and that he had not done so. He admitted also that the attorney for the injured party was also his own attorney. The appellate court said that the company's failure to attempt to secure a continuance was at most an error of judgment and did not evince any bad faith on the part of the company; that the evidence did show bad faith on the part of the assured, and that there was nothing in the case to show waiver or estoppel to set up such a defense.

It will be remembered that the insurance company conducted the defense of the tort action at a time after it knew of the assured's

lack of cooperation, but the insurance company had taken from the assured a written non-waiver agreement.

This doctrine is again announced by the Court of Appeals of New York²². The insurance company had a discussion by letter with the insured respecting a violation of the policy, as a result of which the insured said that he would be able to prove definitely that there had been no violation. The company told the assured that if a violation were proved at the trial, then that the company would not be responsible for loss.

In the decision, the court uses the following language:

"I confess that I am unable to see how the defendant (insurance company) with greater precision could have followed the lines of its agreement and satisfied the demands of its customer while at the same time it preserved its own substantial and undoubted rights * * * and this case comes well within the decision of *Mason-Henry Press vs. Aetna Life Insurance Company*."

Again, in a decision by the Circuit Court of Appeals for the Eighth Circuit²³, the action involved the question as to whether or not a boy had been employed by the insured in violation of law as to age, the assured having in good faith received statements with respect to the boy's age at the time he was employed.

Shortly after the suit was filed, the insurance company wrote a full comprehensive letter to the insured in which it stated that if the boy was in fact under sixteen at the time he was injured, then that the policy did not cover the liability; and that the insurance company would decline to pay any judgment if it were established at the trial that the boy was unlawfully employed. It advised the assured, however, that until the controversy was settled the company would tender to the assured its service for investigating the claim and for defending the case all without charge to the assured, up to the time of the determination of the question involved and that said tender was made with the distinct understanding that the company would not thereby waive any of the policy

²²Gordon vs. Massachusetts Bonding and Insurance Company, 128 N. E. 204.

²³Meyers vs. Continental Casualty Company, 12 F. (2d) 52.

²¹Rohlf vs. Great American Mutual Indemnity Co., 161 N. E. 232.

provisions, closing its letter with the following statement:

"If you are not willing to accept the services of the claim department and the law department of the insurance company * * * on the terms herein stated, then please notify us at once for we do not want to be put into a position of waiving any provision of the policy."

The assured received this letter but made no reply thereto. The case was tried and the evidence showed conclusively that the injured party was under sixteen years of age at the time of the injury. After the evidence had been completed, but before the argument of the case, the attorneys for the insurance company wrote the assured another letter advising him that the claimant's age had been clearly established; that the injured boy had been employed contrary to the provisions of the statute; and that the insurance company disclaimed all liability under its policy for damages resulting from such injury and would decline to pay any judgment rendered, but that the insurance company would pay its attorneys for the handling of said case "up to this time and throughout the present trial * * * inasmuch as you could not procure other counsel who could properly take hold of the case and finish the trial."

The injured party recovered judgment and the assured employed new attorneys to represent him. After judgment against him, the assured filed this suit contending that the insurance company had waived the policy provisions by assuming defense of the tort action.

The court pointed out that the insurance company had made its position clear at the outset, quoted at length from the opinion in the case of *Mason-Henry Press vs. Aetna Life Insurance Company* and held that the assured impliedly assented to the defense of the case by the insurance company under the terms and conditions stated by the company, and that nothing which the insurance company did could possibly have led the assured to believe that it admitted liability.

Of What Does Cooperation Consist?

Holding that the cooperation clause is a valid, provision, the courts have said that this means that there must be a fair and

frank disclosure of information reasonably demanded by the insurer to enable it to determine whether or not there is a genuine defense; that a deliberate and wilful falsification of material facts will violate the policy, but that to constitute a failure to cooperate, such statements must not only be material, but must be a conscious deviation from the truth;²⁴ and in a late case decided by the Circuit Court of Appeals for the Second Circuit,²⁵ the court said that the assured's unexcused failure to attend the trial of the tort case would under ordinary circumstances constitute a complete bar to recover on the policy; but this court made the observation that such a breach by the assured would not be a bar to recovery if the plaintiff made it appear that the company had no real defense but only a sham defense and that it did not need the assured because he could say nothing to excuse the collision.

In a late case decided by the Third Circuit,²⁶ the court said that the assured's refusal to give its statement to the company as to how the injury occurred and its refusal to sign the pleadings in the defense of the case justified the company's refusal to defend the assured in the tort action, and in a late Massachusetts case,²⁷ it was held that the assured's failure to report the accident to the company until two months after it occurred because the assured did not consider that any serious damage had been done constituted a failure to cooperate.

The Duty to Compromise

Many policies which have been before the courts have provided that the assured shall not, except at his own cost, settle any claim or incur any expense, or interfere in any negotiations for settlement, or in any legal proceedings without the written consent of the company. In an early case construing this language, the court held the assured to the strict terms of the policy. In that case, the insurance company had refused to accept an offer of settlement and exercised its exclusive right to defend the case. The court said:

²⁴*Ocean Accident and Guarantee Corporation Ltd., vs. Lucas*, 74 F. (2d) 115.

²⁵*Hoff vs. St. Paul-Mercury Indemnity Co. of St. Paul*, 74 F. (2d) 689.

²⁶*Bruggeman vs. Maryland Casualty Co.*, 73 F. (2d) 587.

²⁷*Wainer vs. Weiner*, 192 N. E. 497.

"Thus the assured helplessly awaited the determination of the question whether in that instance the policy of indemnity was to be a shield in its own hands, or a weapon in the hands of an antagonist * * *. The power to decide the question of settlement had been surrendered to the insurance company * * *."

The court held that the parties might fix their rights by contract in such manner as they chose.

That rule has been somewhat modified and it has been held in a New Hampshire case,²³ that where the company assumes the duty of defending a claim it owes the assured the duty of settling the claim if that is the reasonable thing to do; and that if the insurance company negligently makes no serious attempt to settle until matters are in such shape that the claim cannot be settled as advantageously to the assured as formerly, then that the assured may recover from the insurer the loss so occasioned, and in this case it was only by inference that the policy contained a clause prohibiting the assured from assuming liability or settling the claim.

In a later case this court said that the insurer is bound to give to the rights of the assured at least as much consideration as it does to its own.

An interesting case is one decided by the Kentucky Court of Appeals²⁴ which involved an employer's liability policy and the question of whether the injured was under legal age and therefore unlawfully employed. The insurer and the assured indulged in letters and lengthy conferences with respect to the company's liability and its ability to preserve its rights, pending which the injured party offered to settle his claim for \$6,500. The assured offered to pay \$1,500, demanding that the company pay the limit of its liability, \$5,000, which the company declined to do.

The attorneys for both the assured and insurer cooperated in the trial of the case and the injured person recovered judgment for \$10,000. Assured brought this action to recover the \$5,000 excess and the further sum of \$3,500, representing the excess over the proposed settlement figure of \$6,500. The

insurer contended that it had no liability because of the unlawful employment and the assured contended that the insurer had waived its right to assert that defense and did not exercise good faith in refusing to compromise.

The court pointed out that if the injured party had in fact been lawfully employed, then that the insurance company would be liable, but if he had been unlawfully employed, then the assured alone would be liable, and held that the insurance company did not waive its right to assert a violation; that the company had no obligation to pay the policy limit in order to compromise the claim, and the court approved the following rule:

"Each of the parties to a contract like this has rights that the other must respect, and neither can by negligence or indifference or failure to act violate the spirit of the contract in such a way as to put upon the other loss that it need not have suffered.
* * *

"All it (the insurer) was bound to do was fairly to assert its rights under the policy in such a manner as would be notice to the insured that it did not waive those rights, * * * and also to do nothing in the defense of the action to the prejudice of the rights of the insured. * * *

"The insured had no right to demand that the insurance company should surrender the defense of the case to it, and the insurer had no right to demand the exclusive control of the defense or to do anything that was not to the interest of the insured. It was a delicate situation, and, as we see the record, nothing was done that the insured had any reason to complain of.
* * *"

In a New York case²⁵, the automobile policy provided indemnity to the extent of \$5,000. Action was brought for the sum of \$40,000 and was defended by the insurance company.

Before trial, claimant offered to settle the case for \$6,500. Both the assured and the insurance company agreed that the case should be settled and that this offer should be accepted. However, the assured agreed to contribute only \$1,500 and demanded that the insurance company contribute the full

²³Cavanaugh vs. General Accident F. & L. Ins. Corp., 106 Atl. 60.

²⁴Fid. & Cas. Co. of N. Y. vs. Stewart Dry Goods Co., 271 S. W. 444.

²⁵Auerbach vs. Maryland Casualty Company, 140 N. E. 577.

amount of the policy liability. This the company refused to do, but offered to pay \$3,500, which was rejected by the assured. The claimant recovered \$20,500, whereupon the insurance company paid the amount of its liability of \$5,000, and the assured brought this action to recover the sum of \$15,500.

The court held that there was no negligence on the part of the insurance company in its investigation of the facts or in the defense of the case and no suggestion that it had been guilty of fraud; and that the terms of the insurance policy were unambiguous and were to be understood in their plain, ordinary and popular sense; that the policy did not obligate the insurance company to effect a settlement but rather gave it the option so to do; that the assured had surrendered to the company the absolute, full and complete control of the case including the power to settle or try; that although prior to the trial the insurance company realized that a settlement could be made on favorable terms and that the same ought to be accepted, this conclusion and its advice to the assured imposed no legal obligation upon the company to make such a settlement; that the probability that the judgment would far exceed the settlement offered was as well known to the assured as to the company and that the assured not having been misled and not having been imposed upon by fraudulent practice could not recover beyond the amount stated in the policy.

As was stated by a Louisiana court²¹, when the insurer has the exclusive right to settle free from interference by the assured and has an offer for compromise for an amount within the policy limits, it need only act with good faith and reasonable judgment.

On the other hand, the insurer may be held liable for fraud or bad faith on its part in failing or refusing to compromise a claim for an amount within the policy limit; and on this subject it is stated in a Wisconsin case²²:

"The good-faith performance of the obligation which the insurance company assumed when it took to itself the complete and exclusive control of all matters that determine the liability of the insured requires that it be held to that degree of care and diligence which a man of ordinary care

and prudence would exercise in the management of his own business, were he investigating and adjusting such claims."

The Character of the Defense

When the insurance company takes charge of the defense, it must act in good faith, which means that it must put forth its best efforts. In a Kansas case²³ decided fifteen years ago, the policy covered employer's liability; the petition disclosed that the employee was injured as a result of a violation of law which excused the assured and the insurer; the insurance company took complete charge and although assisted by the assured's lawyer, the latter was at all times directed by the company's lawyer. Violation of law as a defense was never presented in the main case. After judgment was rendered against assured in excess of the policy limit, assured brought this suit to recover the excess based upon insurer's negligence in not pleading violation of law. The court held that the company should have demurred to the petition in the main action or asserted the defense based on violation of law; that its failure so to do constituted negligence resulting in the loss of the case; and held the insurance company liable for the entire loss.

Predetermining the Liability of the Insurance Company

Mr. DeJarnette has suggested that the declaratory judgment statute might be used by the insurance company for the purpose of determining the liability of the insurance company before the trial of the tort action. Kansas adopted a declaratory judgment statute in 1921. This is not the uniform act, but does require the existence of an actual controversy in order to confer jurisdiction, and the Kansas court has consistently held that an actual controversy must exist and that a difference of opinion is not sufficient.²⁴

Even under these decisions that court probably would hold that after a claim is made against the assured and the company is arguing with the assured over the company's liability that a controversy exists sufficient to confer jurisdiction. However, the Kansas statute provides that where the granting of relief under this statute involves the determination of issues of fact then that such is-

²¹New Orleans & C. R. Co. vs. Maryland Casualty Co., 6 L. R. A. (n. s.) 562.

²²Hilker vs. Western Auto. Ins. Co., 231 N. W. 257.

²³Anderson, et al., vs. Southern Surety Co., 191 Pac. 583.

²⁴Garden City News vs. Hurst, 282 Pac. 720.

sues may be submitted to a jury in the form of interrogatories. Under the Kansas statute it probably is safe to say that a great majority of cases of this character brought by the insurance companies would be tried to juries. This means two law suits in every such situation. While it sometimes is difficult if not impossible to secure a non-waiver agreement from the assured and that procedure does at times create feeling between the assured and the insurer which is not conducive to hearty cooperation in the trial of the tort case, yet the bringing of a separate suit for the purpose of determining the company's liability probably would create a more definite breach between the two.

Then, too, there is the question of publicity. It is conceivable that a declaratory judgment or equity suit might be filed, tried and disposed of before the trial of the main suit without any particular publicity and perhaps without knowledge on the part of anyone except the parties. That would not be true in a small community where everyone knows the other fellow's business. If the company should bring such a suit and should be held to be liable to the assured, then the probabilities are that that fact or some reference to it ultimately would seep in at the trial of the main case.

The Kansas court has also held that all parties in interest must be made parties to a declaratory judgment suit.²⁸ While the injured party is not a party to the insurance contract he has been recognized by many courts as ultimately occupying the position of payment beneficiary. Whether or not he is an interested party and therefore a necessary one to the declaratory judgment suit is one question. Perhaps he is not. But a disgruntled assured might easily see to it that the injured party was at least represented, if not present, at the trial of the declaratory judgment suit.

There is the other question of whether or not the pendency of the declaratory judgment suit would be sufficient justification for the court to stay the main case. Certainly there is no reason in law why the injured person should stand by until the declaratory judgment case is determined.

At some time the casualty carrier is called upon to determine whether or not it is liable. Instead of filing an independent suit for the purpose of determining that liability, I sug-

gest that the company make a thorough investigation at the outset, determine its liability and if it concludes that it is not liable, then to defend under a written non-waiver agreement or declaration of a reservation of rights and if this cannot be satisfactorily obtained, then that it deny liability.

Conclusion

When the insurance company takes full charge of the investigation and the defense of the claim:

It may waive any breach of the policy on the part of the assured if it acts in a manner inconsistent with the insistence that the policy has become forfeited.

This waiver is an all sweeping one which inures to the benefit of the injured party and, depending upon the local statute, gives the injured party the right to proceed in some manner directly against the insurance company.

The insurer does not waive any right of defense based upon facts of which it has no knowledge if it has acted in good faith and has used at least ordinary care and diligence in ascertaining the facts. It may rely upon statements made by the assured unless it has reason to believe the facts to be otherwise, but where it has information sufficient to put it upon inquiry, it is charged with knowing all of those facts which it could have learned by resorting to inquiry.

The company may reserve to itself all of the rights contained within the contract, but this must be done with definiteness and certainty. It cannot rely upon a reservation of rights to which the assured expressly refuses to agree; and it must promptly assert its position when it learns the facts.

It does not have the general duty to compromise; but it does have the duty to act with good faith and reasonable judgment with respect to settlement within the policy limits; and where there is a clear liability on the assured, the company's refusal to effect a compromise must be made in good faith and upon reasonable grounds for the belief that the amount required for settlement is excessive.

Lastly, the insurance company must see to it that every proper defense is made, and must conduct the defense with the same kind of care which it would exercise if the entire liability were its own.

²⁸State ex rel. vs. Wyandotte County, 279 Pac. 1.

Equity In Tax Administration

By ROBERT H. JACKSON

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of Washington, D. C.*

OF THE legal relations upon which the corporate and individual clients must seek advice, none is more vexing than those created by the tax laws of local, state and national governments. Lawyers can no longer remain aloof from the tax problem as one that is trivial, nor can they abandon the problem as an accounting problem, nor can the corporation or family adviser turn it over as an independent and disconnected problem for the specialist. Taxation is not a separate problem but is interwoven with every problem or relationship that involves acquisition or disposition of property.

The public which includes your clients, thinks of taxation largely in terms of rates, economists in terms of incidence and secondary effects, the Treasury in terms of revenue. The bar, better than any other group, is qualified to think of taxation in terms of fair procedure for the ascertainment of liability between the Government, on one hand, and the taxpayer on the other.

Business men have a deep hostility to all problems of taxation. Its burden is so immediately felt and the benefit is so general and remote that the connection between the taxes paid and the benefits received is often totally forgotten. General Motors recently issued a statement to its stockholders in opposition to added taxes in which it declared that "The Government does not create wealth—it dissipates wealth." Someone had forgotten that while General Motors were making automobiles in which there was a profit, the Government was building the highways on which they would be used but on which there was no profit. The revenue producing part of this joint advance has been taken by private industry and the expense part of it by government. No small part of the burden of taxation imposed by our states and even by the Federal Government is the cost of their contribution to the advancement of the motor industry.

As we move in the direction of greater air transportation, airports, lighting services, and other unprofitable parts of that advancement are contributed by government, while the reve-

nues are collected by private industry. Instances could be multiplied without number in which the Government has been compelled to expend large sums in furnishing facilities upon which business has progressed, and the horse and buggy taxes left off when the horse and buggy quit business.

In the struggle over forms of tax, and rates and brackets, our clients have usually overlooked the importance of administrative provisions and only realize their significance when they become entangled with them. Perhaps they are justified in assuming that their legal advisers, individually and collectively, will attend to the matter of providing fair administration.

Any effort to introduce greater equity in tax administration meets at the threshold the age-long strife between certainty against reasonableness, law against equity. Certainty demands fixed rules, literally and uncompromisingly, applied. When we buy certainty we pay as a price arbitrary and unreasonable results. Government of tax liability by rule is predictable but often indefensible. It is strictly a matter of authority. It says "Thou shalt" and "Thou shalt not" and that ends it. Opposed to certainty, is reasonableness, which strives for a rational result even at the expense of bending, or, to be more judicial "interpreting" the rules. Its flexibility and reasonableness are also bought at a price. Confident prophecy is no longer possible. Its results depend less upon the rule and more upon the attitude of the persons who interpret the rule. Its reasoned result in one case may produce confusion in many others.

Lawyers know how English judges invented equity powers long ago as a means of moderating the harsh and formal technicalities in which the common law had crystalized. Equity powers were designed to give the Court a conscience and then, since a conscience running rampant is a very confusing and unpredictable thing, equity itself began to crystalize into formalities and fine distinctions.

Nevertheless the question is asserting itself as to whether conscience might not play a larger part in tax administration.

Our courts were early confronted with the conflict and chose on the side of certainty. Efforts to handle taxing power with an eye to equity were chilled by the Supreme Court in an early case in which the device used by a taxpayer was conceded to be a probable fraud upon the revenue. But the Court made the answer "That if the device is carried out by the means of legal forms it is subject to no legal censure." (U. S. vs. Isham, 17 Wallace, 496 at p. 506.) This declaration early in the history of internal revenue taxation of the United States tended to make taxes a matter of form rather than of substance and has given comfort to every tax trickster since.

The Supreme Court has held definitely to a belief in form as opposed to reasonableness in taxation as appears from the language of Mr. Justice Holmes in *Bullen vs. Wisconsin*, 240 U. S., 625 at p. 630, where he said, "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

The tendency of such declarations has been to justify a formal and technical relationship between the citizen and the sovereignty that would not be tolerated between two citizens, and to permit a rule of formalism to avoid tax obligations that would not be permitted to avoid the obligations of a private contract.

David Harum admitted that the words he had spoken in a horse trade were not "gospel truth" but he said that they were good enough "jury truth." Under the stimulation of the rule of formalism a similar attitude has grown up toward the government and statements that would not pass as sportsmanlike or fair between gentlemen were regarded often as good enough "tax truth."

When, however, this rule of formalism is reversed, it is deplored by the taxpayers. If the taxpayer is permitted to skate to the very edge of tax evasion without compunction as to the true substance of his transactions, it is equally correct for the tax collector to catch him the moment he has crossed the line even if accidentally and even if he has crossed the line in form but not in substance.

There is growing criticism of the rule of formalism as applied to tax administration. Examples of severe and unreasonable prejudice,

sometimes to the government and sometimes to the taxpayer, produce a reaction against it and it is realized that notwithstanding the statement of the Supreme Court there is not an exact and easily discernable line on the one side of which lies immunity and on the other side of which lies liability to tax. Tax liability cannot be defined by meets and bounds with mathematical precision. There is a twilight zone between the taxable and non-taxable transactions and a marginal field within which reasonable and honest men may differ both as to the facts and as to the application of the law.

The dissatisfaction with this situation is evidenced in the complaints of tax attorneys in law review articles and in official circles.

The Subcommittee of the Ways and Means Committee of the House of Representatives in its 1933 report on "Tax Avoidance" recognized the need of some "Equitable Provision" and stated that it would submit a recommendation "on this important problem at a later date if certain practical difficulties can be overcome." To date they have not been overcome.

There is also growing recognition on the part of the Courts of undue formalism of the tax law. In *Gregory vs. Helvering* (293 U. S. 465) the Supreme Court refused to permit a taxpayer to take shelter from a tax burden by using reorganization provisions of the statute to disguise a sale and said "The whole undertaking * * * was in fact an elaborate and devious form of convenience masquerading as a corporate reorganization and nothing else." In the recent case of *Bull vs. Commissioner*, 55 Supreme Court Rep. 695, the Supreme Court compelled the government to do equity by allowing a claim barred by the statute and arising out of a transaction which was not barred by the statute, in order that an unjust enrichment of the government at the expense of the taxpayer would not occur. However, no Court has yet avowed equitable jurisdiction in tax cases. The occasions when Courts exercise the powers to do equity are rare and not likely to be very much extended. Meanwhile, the old adage that "hard cases make bad law" is frequently exemplified in tax decisions.

The Treasury Department, recognizing the inequities of the present system, both to the taxpayer and to the government, is engaged in a study of the administrative features of the income and other tax laws as the basis upon which constructive administrative re-

form can be based. It is not my purpose to anticipate those studies, but it is important that all who have to do with tax procedure reform understand at the outset what the problem is.

Our problem is the ancient one, how to have our cake and eat it too—how to have an impartial and inflexible rule which will still take account of each individual's circumstances and yield to reason. Lewis Carroll long ago called attention to the fact that "the more you have of this the less you have of that." The more we have certainty the less we have reason. The more we have of reason the less able are we to make confident prophecy as to what tax liabilities will be. The problem is one of a proper selection of values and of proper balance or combination of the two, always remembering that as one end of the seesaw goes up the other goes down.

Some of the complexity, conflict and confusion in the tax law, is due to the number of cooks who make the broth. Congress gives us a statute, and the Treasury supplements it with regulations, and amends the regulations with frequent Treasury Decisions. The Bureau and the General Counsel make rulings and interpretations, published and unpublished, and mimeographs attempt to convey to officials the policy and attitude of the administration. Then begins judicial interpretation. The Board of Tax Appeals, the Court of Claims and every United States District Court in the land have original jurisdiction of cases in which they lay down the law. The Circuit Courts of Appeal hand down binding interpretations. The Attorney General writes opinions on tax matters which are controlling on the administrative authorities and the Solicitor General, through determining in what cases to apply for, or consent to, review, and in what cases to acquiesce in lower Court decisions, governs the Bureau. Then the Supreme Court has the final word in the limited class of cases that reach hearing there. No less than thirteen sources, with diverse aims, backgrounds and equipment, are contributing to the stream of tax law that vexes lawyer and taxpayer alike.

All of these, except Congress, disclaim power to do anything but enforce the law as it is written. No one is given, and none will assume, power to do equity.

Congress sometimes attempts to do equity by legislation. After a general rule has been found to bear with unexpected or unequal weight upon some group, an exception is cre-

ated. Then, if the exception is availed of for evasion, an exception to the exception is created. One rigid and unworkable formula supplants another, to the confusion of taxpayers and to the profit of lawyers. The legislative history of the income tax leaves little doubt that equity cannot be anticipated by legislation, and that mischief comes of the effort to take care of special cases and particular classes by statute.

Then there is the effort to do equity by legislation after the event. Every session of Congress passes a number of bills to grant private relief. Considering these individually, many seem to be trying to undo obvious injustice, others have concealed schemes not so laudable in purpose. All represent a wrong approach to the problem. If the statutory rights of the government are ever waived, the benefit of the waiver should not be confined to those whose influence or persistence wears down legislative inertia.

Some persons unfamiliar with the problems of administration think that the whole matter of equity doing is for the Bureau, that the Commissioner should assert no "unfair" claim, and his counsel should defend no position the equity of which is not clear. I cannot imagine the Treasury wanting chancery powers, or the right to waive tax claims for doubt of equity. And it would require a Commissioner with a mind as neutral as the Recording Angel to administer it. The fact is that no one can be always on the same side of a controversy and preserve his neutrality. I am not sure that we should even strive for neutrality. The taxpayer is better informed of the facts, represented by highly interested and zealous counsel, and is the government to have no advocate? If the right of the government is waived by mistaken judgment, it is forever without remedy, but the taxpayer may always have a remedy by appeal if the administrative decision be wrong. Ideal administration would permit no evasion and no overreaching by government. While human nature remains human we will have some of both, and it forms the materials of our litigation.

If there is to be power to disregard the law and to do individual justice in the matter of taxation that power can only be vested, with hope of success, in a tribunal judicial in character. It must be surrounded by the judicial tradition in order to protect its personnel from political pressure. It must hear in public, decide upon a record, and make its reasons known if it is to keep public confi-

dence. And its jurisdiction must be equally available to the government and to the taxpayer. There are more cases of inequitable escape from tax than of inequitable collection of tax. On the whole the government would probably gain from application of equitable principles to taxation.

A tax equity tribunal, if it were to be useful, would not be one to decide cases according to the law. We have enough of that now. The complaint is not that the law is not followed, it is that the law is followed too blindly. Equity would have to do what the present courts cannot do—it would decide when the law should be disregarded. Also it could not advantageously be a fact-finding body. We have enough of them. The reviewing of cases from one group to another is one of the vices of our system. There is never an end of it and the course of a tax case through the multitude of reviewing hands is often a delirious one. But it is demanded by taxpayers, rather than by government. The taxpayer always wants one more chance. He has nothing to lose and may win if he can get another hearing somewhere. The present machinery is over adequate for deciding law and fact.

There is no one with authority to say that the law as applied to a particular state of facts should be disregarded in the interest of a fair result. Perhaps there should not be. How would a decision that, while the law did not authorize a particular assessment, justice required it, be received by taxpayers? After all, I doubt if taxpayers would, as a class, want an equity court unless it were a one-way court.

It is also important that we get clearly in mind what powers must be given and what steps must be taken if we are to establish an equitable basis for taxation as distinct from a basis by arbitrary rule.

Our income tax administration has become legalistic rather than realistic or economic. It is very desirable that the principles for determination of tax liability be very simple and elementary if we are to ask citizens to assess themselves their tax liability.

If simplicity and freedom from technicality is to be accomplished it must be, however, at the expense of divorcing our tax system entirely from our legal and judicial system. So long as tax problems must be strained through the judicial sieve they will be shaped by the legal mind. The possibility of Court review

makes it to the advantage of the taxpayer to employ counsel to assert even the most extreme of legalistic positions, and the government combats the position with the same kind of tools.

We may assume that those who have reached the economic aristocracy who constitute income taxpayers have moderate knowledge of the law of property and contracts such as would be necessary to determine tax liability. But principles of law that were valid in the field in which they were developed have been imported into the income tax administration where their adaptability may be defended in logic but scarcely so in good administration. When we press such doctrines as the constructive receipt of income beyond the point necessary to prevent intentional evasion, we are in a field where the layman is lost. We got into such legalistic mazes as the one we are in regarding improvements made by a tenant as income to the landlord. Should they be reported as income when added to the landlord's property? Or should they report on an accrual basis? Or do they become income when turned over to the landlord's possession? Or only when the landlord realizes by selling them? I have little patience with forcing the lay taxpayer to answer such abstractions for which even the legal mind has no very satisfactory solution. Tax experts have spun their theories so fine both on the side of the government and of the taxpayer that some of their discussions inevitably bring up the image of the kitten with a ball of twine.

And yet can revenue agents or Treasury officials overlook the very questions upon which the legal minds decide cases that involve the applicability of tax laws? The taxpayer urges "common sense" in tax administration—but the cases are decided on law.

The long wait for final court action is responsible for much maladministration. A statute is passed, a question raised. Often the Supreme Court will not hear it unless and until there is a conflict of decision in Circuit Courts. Meanwhile, we guess at what the law will be, but we do not trust our guess. The Bureau always has many cases in the morgue waiting for settlement by the courts of some underlying question. And pending decision you may be shocked to know that we sometimes take both positions. That is, we take opposite sides of the same question, whichever will be to the advantage of the revenues. I was shocked at the apparent dis-

honesty of that policy when it first came to my attention. But I can find no way to avoid it. If we guess wrong, and a lot of cases expire by limitation, our position would be indefensible. Also, both sides of the same question are being taken by taxpayers who are under no duty to be consistent with each other. The problem of how to properly administer the law, while you are waiting for the courts to make up their minds what the law is, can be best illustrated by the cases governed by the famous *Butterworth* decision.

A man bequeathed properties to a trustee to pay the net income to his widow during her natural life in lieu of her statutory rights and dower in the husband's estate. Manifestly, some one should pay a tax on this income, and the Commissioner proceeded to collect from the beneficiary. The Circuit Court of Appeals held in several cases that the income was not taxable to her as a beneficiary. There was no conflict in the Circuit Court decisions and, under the mandate laid down by the Courts, the Commissioner proceeded to refund tax to those beneficiaries who had protected their rights, and also according to the decision of the courts assessed the tax on this income to the trustees in such cases as the assessment was not barred by limitations. A similar case finally reached the Supreme Court, which decided that the Circuit Courts were in error and that the income, under these circumstances, should have been taxed to the beneficiary and not to the trustee. So, under the mandate of this latest declaration of the Court, the Commissioner has brought suit to recover many of the erroneous refunds which he had made to widows and is obliged to make refunds to many trustees. In many cases, however, the refunds and their recovery are both barred by the Statute of Limitations, and the government or the taxpayer must abide by an unlawful result because the decision of the Court could not be known in time to govern their acts. Many cases resulting in long periods of confusion and uncertainty in large litigation, and many unfair results could be cited in which the delay in learning what law the Court would apply has been responsible.

Chancery powers, to be of use, must include power to disregard the Statute of Limitations. It is responsible for many unjust results. Its inequities are visited upon the government and upon the taxpayer.

In 1926 a utility company abandoned a trolley line and thereby suffered a large loss.

The Public Service Commission, having jurisdiction, for reasons of its own, did not allow the charge-off on the books of the company until 1929. It then made the write-off and took the deduction from its income in that year. The Bureau was of the opinion that the loss occurred in 1926 and would not allow it in 1929. The statute had closed 1926. The taxpayer therefore was not allowed the loss in either year. It was caught between the conflicting policies of the regulatory commission and the Commissioner of Internal Revenue, and by the time the effect of the two policies became apparent remedy was barred.

From 1918 to 1920 the railroads were operated on accrual basis but had never reported the amounts accruing from government, as they were not ascertained. When payment was received in 1923 it contended that it was not income for that year, but for the prior years of government operation. It was sustained in that contention; those years were closed by limitation so no tax was ever paid.

These two cases illustrate the haphazard operation of the statute. Many cases could be cited where the effect had been unjust to one side or the other. Some lawyers have made enviable fees by playing the statute against the government.

All will agree that it is desirable to have a time come when questions of tax liability are over, when records may be disposed of and inquiry ended. The very nature and the virtue of a statute of limitation is that it is arbitrary, and, while often unjust, has a social value that offsets its occasional injuries. It has proved to be very beneficial in other fields of law. There, however, if a debtor once pleads the statute, it may be assumed that his relations with that creditor are ended. But it is different with the government. The relation with the taxpayer is continuing. It is not a single, isolated transaction that is outlawed. The tax effect of the transaction may be felt for years long after the statute has run. It is hard to apply a statute of repose to a state of affairs where there is no repose. *Banquo* may be slain by the statute, but his ghost will sit at many a conference table thereafter. Yet we must either have the statute or not have it.

A court of chancery would need powers to disregard the policy of cutting up the affairs of the taxpayer into strictly annual sections. Business is not done that way. The opera-

tions of any year govern those that follow, and strikes root into those that have passed.

A strict annual basis for the computation of the tax has been followed in this country, although England has found greater equity in paying some regard to average income over a reasonable period. We, however, take a gradual process like the recognition that a debt has become a loss, or that a stock has become worthless and insist that a moment be fixed when it passed from one class to the other. Nothing could be more arbitrary than to date worthlessness except to date the moment that the worthlessness was known. Of course there are cases where the signs are sudden and unmistakable. Losses of this kind usually creep up on one, and the difference in optimism of taxpayers may account in good faith for a considerable difference in the dates when they feel impelled to recognize a loss. Of course, he is also inclined to take the loss when it will do him the most good. But there is a tendency to substitute the judgment of the reviewing officer, with the aid of much hindsight, for that of the taxpayer who had only foresight to rely upon.

Then the annual basis has led to an undue emphasis upon the annual rate of depreciation allowance. The really important thing is that the taxpayer shall not, in the aggregate, exceed one hundred per cent of investment with his depreciation charges. Too high an annual rate may look like an advantage, and is a temporary one. But in the long run it has cost taxpayers a pretty penny to have charged off their plant at too fast a rate, and now, when the tax rates are higher, to have little depreciation left as a cushion.

Should a tax tribunal with equity powers be authorized to depart from the strict annual basis in determining a fair tax?

Another device of an equitable nature is the representative suit, and it is worthy of consideration whether it could be applied to tax matters. In many situations one person may sue on behalf of himself and of others similarly situated. Frequently large groups of taxpayers who are all stockholders affected by one reorganization or who have other identical interests in the subject matter are all interested in a decision but are not technically bound by it and have not had opportunity to be heard in the case in which it was rendered. As a practical matter one decision frequently settles an entire group of cases, although it is not always accepted by all who are affected.

Could we adopt the representative principle in settling tax liabilities?

Another device of statutory parentage, but with a suggestion of equitable ancestry, is the declaratory judgment. It was devised to enable litigants to ascertain their rights from the courts without awaiting occurrence of damages or other conditions necessary to a law action. There is a constant demand upon the Commissioner, or his Counsel, for rulings declaratory of the law, which will have the effect of advising taxpayers what their liabilities will be if they undertake certain reorganizations or other transactions. We recognize that it is but fair that the taxpayer learn the law governing his liability before he has committed himself irrevocably.

In practice, however, such rulings have proved to be a fruitful source of misunderstanding and litigation. In the first place, no Court undertakes to render declaratory judgments to advise citizens what their rights or liabilities will be if they undertake certain ventures in the future. They will declare what the liabilities are that have already resulted from the acts of the parties, but I know of no jurisdiction in which the Courts have undertaken to render declaratory judgments on hypothetical questions. Yet this is exactly what the Commissioner is asked to do. The taxpayer accepts the ruling, or rejects it, as suits his interest. He follows through the plan he has submitted, or he alters it as he may be advised. And, more troublesome than all else, he frequently neglects to state all of the facts which are important to a ruling. The Commissioner later learns of unrevealed facts and reverses the ruling. The taxpayer complains that he has been "double crossed," and the Commissioner complains that he has been misled.

We have given considerable study to the possibility of setting up a division for the purpose of giving binding rulings, particularly in situations where a large number of taxpayers will be affected by proposed transactions. So far, no satisfactory formula has been devised, and the aid of the bar would be welcome in devising a workable plan.

We are getting too much law, and too many kinds of law, and from too many sources, for tax administration to be simple, or the law clear. Should we reserve to the Supreme Court only Constitutional questions in tax matters? Should matters of statutory construction be settled by a tax court, instead of by the twelve Circuit Courts of Appeal, with

their frequent conflict of viewpoint? Should questions of fact be finally settled by the finding of the Board of Tax Appeals? Cannot questions of valuation be settled administratively?

Many such questions press for answer. The experience, the technical knowledge and train-

ing of the lawyer are necessary to the solution.

The bar owes a responsibility to both its government and its clients to give tax procedure as steady and careful consideration as our professional associations give to other problems of the administration of justice.

To Our Trial Attorneys—The Compliments of the Home Office

By FRANK J. ROAN

Vice-President and Counsel

*The Commercial Casualty and Metropolitan Casualty Insurance Company,
of Newark, New Jersey*

ONCE to every man comes such an opportunity as this—so here goes! I speak for all your friends—the Vice-Presidents of Claim Departments—those men whose lives are devoted to two things—raving over the writing of such a risk and thanking the Lord for verdicts for the defendant.

Standing here before counsel who have lived through trials that would have flattened men less resourceful, I am mindful of my Home Office training which exudes caution for I fully realize that every compliment paid for the good work you have done for us entails the possibility of establishing an open admission that you are good, and being good, you'll expect to be compensated accordingly! What I say here then is obiter and off the Record.

Years of contact, personal in many instances, has made for me many friendships among you trial men which will endure so long as we shall stand shoulder to shoulder and say to the Plaintiff's attorney who looks upon a policy limit settlement as a compromise: "You'll have to go get it, Brother."

We at the Home Office envy you trial men—you are on the firing line—taking active part in the real battle—and what a part, while we sit there relying on your reports of developments, giving you opinions from the side lines, at the same time wishing and praying for your success, pulling for you to win, and sharing with you to the last drop, the disappointment that comes if you lose. But remember this, gentlemen, every Claim Executive I know shares my view of a law suit—it's a battle from start to finish, and to the trial man who goes in there for us, giving us

the best he's got—we say to him—win or lose, we are for you. I wanted to come here and tell you that, for it may help you more than a little when you get back home and start in on the September grind of trial work—when the going gets tough—to know that we are back of you. (Just so you don't get too far back) as one trial friend of mine once said. And referring to the subject of this address, another trial friend remarked that if I'd just pay his bills he'd forego the compliments.

In retrospect and prospect, our Home Office job has been well worth living from the memories of cases that pass before us, many of which do not contain in the files the real story of the trials—the things our trial men tell us when we get together. After all, our duties compel us to place values on human lives, broken bones, human suffering at its topmost peak, and if you and I can get a laugh from the less serious side—let's have it, for tomorrow we may sweat together over what any jury anywhere may do to us.

Naturally, we don't want to spend money unwisely. After all, you and I have the responsibility, but it's the stockholders' money. Millions of dollars, year in and year out, must be paid for legitimate losses, and we don't begrudge a nickel of it for an honest settlement, but, gentlemen, we are going through a period, national in its scope, when we have to unite to stamp out a rising epidemic of fraudulent claims that has astounded us at the Home Office by its diversity and magnitude.

I have talked of this angle with representative trial men here from various sections of the United States, and the problem of com-

bating these fake claims is almost imperative if we are even to survive and continue writing lines producing such claims. Automobile liability and other liability plus that permanent headache, compensation, have contributed heavily to the annual tribute we have paid to the accident racketeer. But we win some of those cases, too—don't forget that. There are too many seasoned, tough defense attorneys here, and many not here, to let it be said we simply stand up and take it. If and when the public can be made to realize it is they who ultimately pay the freight, we will hope for an even break. I repeat there is not a company among your clientele which will not advocate the prompt settlement of legitimate suits, but by the same token, we of the Home Office say to you here and now—"If it isn't on the level, make them go and get it."

Sometimes they do, too—like the time Harold Hathaway of Taunton and Boston was trying one for the Boston Elevated against Fred D. Anyone here who has ever seen that pair in action can tell you it represents the acme of skill, wits, courage and plain battling. Fred's client was a passenger in an El train which collided slightly with another one. Fred claimed his client sustained such a systemic shock she would never again be able to do this—that—and the other. A past history investigation by the Elevated Claim Department under Hathaway's direction revealed the past in her life had been pretty much like a Merry-Go-Round—two illegitimate children, one abortion and at the time of the trial being treated for a 4 plus condition. Hathaway was so confident he wouldn't pay a cent.

They tried it, and all this went in—including a powerful summation by Hathaway for the defense. And D., master psychologist that he was, said to the jury: "Gentlemen, counsel for the defense would have you believe my client is just a plain prostitute—well, what of it? That doesn't give the Boston Elevated a right to try and kill her, does it?" They had to tie Hathaway to his chair when the jury brought in a verdict for the plaintiff.

Some years ago, a trial man in Chicago now retained by Public Service and Insurance Companies, had four cases in succession for plaintiffs against the Chicago Street Railways. The claim agent for the Railways was a witty Irishman—a tough claim man who, when he got mad or excited, would stutter. He wouldn't pay a cent in any of the cases, so they had to try them—each verdict in the first three being higher than its predecessor. Plaintiffs Counsel was out when the fourth one came in, and met the claim man who had heard the verdict, as he was coming out of the court house.

"What did the last jury do, Denny," inquired plaintiff's lawyer.

"Hey, listen," said Denny, "th-the next t-time, d-don't bother f f filling your writs—j-ju-just go down to the office and t-take th-the gaw-dam safe."

Gentlemen—trial men all of you—I say goodbye. I shall always remember this meeting with you, this opportunity to tell you collectively, the opinions of you and feeling for you of the Home Office Claim Man—and I close with the wish—"May you win, and if you can't win, go on in and take it."

Report of the Sub-Committee on the Salary of the Secretary-Treasurer to the Executive Committee

YOUR Sub-Committee, appointed to investigate the status and report on the amount of salary the Secretary-Treasurer should receive during the ensuing year, begs leave to submit the following:

From the data furnished us we find that in September of 1920 at Atlantic City, New Jersey, a number of General Counsel of Accident and Health Insurance Companies met and organized the predecessor of this Association. The membership was at first limited

to General Counsel of Accident and Health Companies, but in 1927, the constitutional provision as to eligibility for membership was broadened so as to include General Counsel of Casualty Companies. Up to that time the membership had only grown to forty-one, and Mr. John Millener was acting as Secretary, being paid his expenses, covering postage, telegrams, stenographic work, circularizations, stationery, printing, etc., and expenses in attendance at the meetings of the Association.

On September 12th, 1928, the Executive Committee of the Association at its meeting at the Chamberlain-Vanderbilt Hotel, at Old Point Comfort, Virginia, reported that the Association had a membership of two hundred and seven, one hundred and sixty-six of which had been secured that year. A motion was made by Earl C. Mills and seconded by George W. Yancey, that in as much as the duties imposed upon the Secretary-Treasurer had now increased to such an extent that the work now takes considerable time, and will increase as our membership grows, that the Secretary-Treasurer be allowed, for his services, compensation at the rate of Three Dollars per member each year. The motion duly carried and at the same time the membership dues were increased from Five Dollars to Ten Dollars a year.

In the absence of the Chairman of the Executive Committee when the Association convened the next day, that is, September 13th, 1928, the Secretary-Treasurer read the Executive Committee's report. The printed copy of the proceedings contains no mention of the amount of the compensation the Secretary-Treasurer was to receive, (Annual Report of Proceedings 1928, page 10), although it does appear that the increase in the amount of dues was read and acted upon by the Association. From the Record evidence it is to be observed that the Executive Committee fixed the compensation of the Secretary-Treasurer, as above stated, but that the matter was not reported either to or acted upon by the Convention, or reported through the Year Book, to the Association members, except as found included in the amount of the sum total of expenses reported from year to year, but nothing to indicate the basis of the salary. No Executive Committee or Convention Records covering the meetings at Hot Springs, Virginia, September 12th and 13th, 1929, or of the meeting at Ottawa, Canada, September 11th, 12th and 13th, 1930, were available to your Committee, but the Report of the Secretary-Treasurer for 1931 shows that the membership had increased from six hundred sixty-five to nine hundred and seventy-six, and that the Executive Committee had appointed a Sub-Committee to work out a plan for fixing the Secretary-Treasurer's salary at a lump sum instead of per member per year. The Secretary-Treasurer at the time objected to the Sub-Committee's attempted action, and after some considerable and lengthy correspondence the matter was again dropped.

In 1932 at White Sulphur, West Virginia, the term of office of the Secretary-Treasurer was changed from one year to three years, but nothing was then said relative to his compensation, although it appears that each year the Secretary-Treasurer was paying himself at the rate of Three Dollars per member per year. On August 23rd, 1933, at the Executive Committee meeting in the Stevens Hotel in Chicago, Mr. Yancey brought up for discussion the question as to whether it would be better to pay the Secretary-Treasurer a straight salary rather than to pay him fees per member. After a somewhat thorough discussion, the amount of Three Thousand Two Hundred and Fifty Dollars was arrived at. On August 26th, 1933, the Chairman of the Executive Committee reported to the Association in Convention assembled as follows:

"Your committee recommends * * * that the salary of the Secretary-Treasurer be fixed at Three Thousand Two Hundred and Fifty Dollars for the ensuing year."

There was considerable discussion on the Convention floor as to whether the Committee had determined that the Three Thousand Two Hundred and Fifty Dollars should be "per year" or "for the ensuing year" and the Convention approved the report of the Chairman of the Committee as above quoted.

That portion of the report of the Executive Committee referring to the salary of the Secretary-Treasurer is found to be deleted in the printed report of the Convention (Proceedings of 1933, page 115). The report of the Executive Committee directing the President to appoint a Committee of Three to revise the By-Laws was approved in the 1933 Convention and such committee was duly appointed and reported to the 1934 Convention. In that report, which was adopted by the Convention, Article 6, Section II of the By-Laws read as follows:

"No elective officer or member of the Executive Committee shall receive any salary or compensation from the Association for services rendered, *except such compensation as may be fixed by the Board of Directors for the Secretary-Treasurer.*"

Immediately after the Convention of 1934 adjourned, the newly elected Executive Committee was called into session. One of the matters presented for its consideration was

the question of the compensation of the Secretary-Treasurer for the ensuing year. The Secretary-Treasurer being a member of the Executive Committee was present in the meeting room, and was asked as to his duties, and for his opinion as to what compensation he should receive. After detailing his duties he suggested that he would consider Three Thousand Dollars as a reasonable amount. He laid great stress on the amount of work necessary to get out the Annual Report, stating that most of his time until about the middle of November would be thus taken up. The Committee then determined to do away with the Annual Report as such, and to include it in the Journal. Finally, a compromise amount of Two Thousand Dollars was suggested, which, upon motion duly made, and seconded, was declared carried without a single dissenting vote, and such amount was thus fixed as the salary for the ensuing year. The newly elected members of the Executive Committee were not advised by the Secretary-Treasurer or by anyone else that any question was being made, then, or had been made the year before, challenging the right and duty of the Executive Committee to fix such compensation.

If, therefore, we are to be guided solely by the cold facts as they appear on the records, we would be forced to the conclusion that the amount of Two Thousand Dollars was fixed and should stand as the Secretary-Treasurer's compensation for the ensuing year. However, may we not be compelled to look through and beyond these facts, and there find a principle of law which should also be considered. That is, whether the salary of an officer fixed for the term of his office remains so fixed, and further, that the officer is entitled to such salary for the entire term as an incident to his office, and finally, that the authority fixing the salary has no power to refix or change it during the term without the express consent of such official.

It is conceded that Mr. Millener was elected to his office for a three year term beginning in 1932, and that at that time his salary had been fixed and determined by the Executive Committee and was being paid at the rate of Three Dollars per member per year.

For the first year, of this three year term, he received that salary, which was figured on a per member basis. It, therefore, plainly appears that there was a common understanding that he was to receive a salary on the basis of Three Dollars per member for the term of the office to which he had been chosen. There can be no question but that in 1933, he expressly agreed to a change in his salary from the member basis to a lump sum of Three Thousand Two Hundred and Fifty Dollars for that year, and while it is difficult to construe his actions in the Executive Committee meeting of 1934, on any other theory than an acquiescence to the Two Thousand Dollars per year amount voted upon, he has since and now says that he did not give his consent, and will not consent to accept such amount.

Your Committee conceives it to be its duty to give Mr. Millener the benefit of every reasonable doubt, and further, keeping in mind that since this is the last year of his three year term, and that the next term will be from year to year for which the salary will be fixed, in consequence of which the action of the Committee can not be construed to be a precedent for the future, we are constrained to conclude that the amount of compensation for the remainder of the three year term could not and should not be changed from the amount agreed to be accepted in 1933.

Your Committee further concludes that Article 6, Section II, of the By-Laws adopted in 1933, has only a prospective application, governing all salaries or compensation of an officer whose term of office begins after the date of the adoption of such By-Law.

Therefore, we recommend that the Executive Committee reconsider its action on the question of compensation of the Secretary-Treasurer taken at French Lick, Indiana, in 1934, and that such compensation for the ensuing year be permitted to remain as the previous year of his three year term, to-wit: Three Thousand Two Hundred and Fifty Dollars.

Respectfully submitted,
RUSSELL M. KNEPPER.
GARNER W. DENMEAD.
M. N. CRESTMAN.

Revised Report of the General Legislative Committee August 30, 1935

AS WAS anticipated, the Committee on General Legislation has been more active this year than formerly; first, because the Legislatures of 44 states and Congress were in regular session; and, second, because members of the legislatures were unusually active in introducing legislation that would adversely affect the business of insurance. As has been said, "Laws are not invented, but arise out of circumstances," and the circumstances have been such as to encourage individuals and groups to demand legislation which in one way or another would benefit them at the expense of others. So we have had insurance agents and brokers seeking laws to eliminate non-resident and part-time agents and brokers, or to impose higher qualification requirements in order to exclude many from their ranks; contractors seeking to tax or exclude contractors from other states, or to exclude those who cannot operate except under almost impossible financial requirements.

Lawyers, through their bar associations, have been very active in having laws enacted broadening the legal definition of "practicing law," so as to prohibit those not admitted to practice law from collecting accounts.

Medical societies have been particularly active in seeking benefits for themselves through physicians' lien laws, and laws permitting free choice of physicians under workmen's compensation laws, thereby prohibiting insurance carriers from selecting the physicians or having any direction of the treatment of injured employees.

Labor organizations have seized the opportunity presented to them to seek the enactment of laws extending benefits to employees, through all inclusive occupational disease laws and other amendments to the workmen's compensation acts, regardless of the results to their employers; insurance companies have sought protection against the unequal competition of unlicensed insurers, and supervising insurance officials have sought laws to further regulate insurance companies to protect the public from their failure.

It is natural that such laws should, under present circumstances, go to unusual extremes and have little regard for constitutionality. They are often introduced to meet some popular demand; to gain the support of the group

involved, or to fulfill the pledges of political parties. Some of these bills are undoubtedly introduced with no serious intention or the hope that they will be enacted, but merely to make a play to the particular gallery interested. All have to be seriously considered, however, by those opposed to them, for it is not safe to expect that much of this legislation will "fall by its own weight," or be too radical to receive serious consideration. Much of the legislation coming under the heading of social security legislation, and sponsored by labor organizations and various welfare organizations, has seemed to many to be radical, but nevertheless has had sufficient support to be enacted into law.

Much of the additional burden imposed under workmen's compensation laws is transferred to insurance companies and thus becomes their problem; but if they cannot assume this burden without loss to themselves, they cannot be expected to assume such additional burden. For political reasons, those who are responsible for the enactment of these laws usually minimize the probable cost.

There is a tendency toward legislation to make the insurance carrier absolutely liable to a person injured by a policyholder when final judgment is obtained against him, rather than merely to permit the injured party to bring suit against the company "under the terms and conditions of the policy," if execution upon his judgment is returned unsatisfied, as under the usual insolvency or bankruptcy clause. Such a law prohibits the company from setting up any defenses that it may have against the policyholder, such as his refusal to testify or produce witnesses, and creates a very serious situation for the companies with greatly increased losses.

There is also a tendency to enact laws providing for survivorship of the action after the death of the wrongdoer, and also for survivorship of the injured party's cause of action after his death. While there may be little objection to the former, we believe that the latter is thoroughly unsound and goes beyond the bounds of justice and reason, for in all of the states the survivors of the injured party have an action for wrongful death in which they may recover indemnity for loss they sustain by reason of the death of the

injured party including expenses for nurses, physicians, hospital treatment and loss of wages until his death. To permit the survivors to bring or continue the action of the injured party after his death will therefore permit them to recover damages for the pain and suffering of the deceased, which caused no loss to them, so that they will receive a profit rather than indemnity in recovering damages for the pain and suffering of the deceased. This, we believe should not be permitted. Some legislation continues to be introduced permitting an insurer to be joined as a co-defendant in negligence cases, or permitting the plaintiff to show on the trial that the defendant is protected by insurance. Fortunately, no such laws were enacted this year. They are too unsound to gather much support.

The necessity for states and municipalities to find new sources of revenue has led to legislation imposing new taxes upon insurance carriers under sales, income, and stamp tax laws or by increasing the premium tax. The tendency is to increase the tax burden of those already taxed rather than to enlarge the class of taxpayers. In a large number of states there is no provision that the premium taxes paid by insurance carriers shall be exclusive of all other state and municipal taxes, except real and personal property taxes, with the result that in a few states companies are forced to pay taxes or license fees to various cities under their charters or ordinances. We believe that in consideration of the high premium taxes and fees which companies are required to pay for a license to transact business throughout a state, they should not be taxed by various cities of the state in order to transact business therein, nor should they be taxed under sales, income or stamp tax laws, and we urge the members of the Association to further legislation making the state premium tax exclusive of all other taxes, state and municipal, except real and personal property taxes.

In some states there has been agitation for laws creating State funds to write certain forms of bonds and insurance. The underlying reason for legislation creating funds to write bonds has been that the laws of the states have imposed such unlimited and unreasonable duties and liabilities upon tax collectors and other public officials that the surety companies could not write bonds guaranteeing the performance of their duties with any degree of safety. In some states these

laws have been amended or new laws enacted, so that the writing of these bonds is now on a sound basis and the agitation for State funds in those states accordingly has disappeared.

There has been a widespread and increasing demand by state supervising insurance officials during the past two years for new codes of insurance laws. This year new insurance codes were introduced in Arkansas, California, Georgia, Illinois, Indiana, Missouri and West Virginia. Virginia, District of Columbia, South Carolina and Texas are taking preliminary steps to introduce new codes. This has presented a tremendous task, for unfortunately these codes always contain many provisions which are highly objectionable, and for various reasons some agents in several states have supported these codes (as they also have supported some other laws that are objectionable to the companies), regardless of these highly objectionable provisions. Companies have therefore been placed in the unfortunate position of being in opposition to insurance supervising officials and their own agents.

We believe that the officials of insurance companies who are responsible for their management and continued success, should be the best judges of the reasonableness and soundness of legislation affecting their companies. We are convinced that insurance companies and their organizations do not oppose reasonable and constructive legislation designed to promote the welfare of the public. We believe they are justified in opposing legislation which restricts their investments to a wholly unreasonable extent; prohibit them from issuing policies until all forms have been approved by the Department, so that the Insurance Department rather than the legislature will prescribe policy forms and provisions; require them to make a special deposit of securities in a state solely for the protection of the policyholders and creditors of the company in that state; permit the court or the jury to impose penalties for not paying claims as promptly as it is thought they should have been paid; give to the Insurance Commissioner the power to make rates; or discriminate unfairly between insurers in the imposition of taxes and fees.

Automobile "guest laws" were enacted this year in Arkansas, New Mexico and Utah, so they are now in force in 25 states, while automobile liability security laws were enacted this year in Arizona, District of Columbia, Colorado, Ohio, Oregon and West Virginia,

and are now in force in 28 states. We strongly urge the members of the Association to further the enactment of these laws. No other state has enacted a compulsory automobile liability insurance law of the Massachusetts type and we urge the members to oppose the enactment of such a law whenever it may be proposed.

We believe that insurance companies fill a great public need and have greatly lessened the effect of the depression to thousands of persons, firms and corporations, as well as to states, cities and municipalities. The fact that so few have failed has demonstrated the general soundness of their management, and underwriting policies, and the great number should not be penalized through unreasonable laws because of the mistakes, negligence or even willful misconduct of a few. Regardless

of the severity of laws, a few will evade them in any kind of business.

During the legislative year of 1935, the members in many states were called upon to assist in opposing objectionable bills. Needless to say, the members responded gladly and their help was not only timely but effective. The insurance companies, and we believe the public, have every reason to be grateful because the International Association of Insurance Counsel has taken an active interest in opposing legislation that is unsound and in promoting legislation that is for the common benefit.

HERVEY J. DRAKE, *Chairman.*

WALTER R. MAYNE.

GEORGE W. YANCEY.

RUSSELL M. KNEPPER.

JOHN A. MILLENER.

Report of Committee on Health and Accident Insurance

IN VIEW of the consistent regularity with which many courts of last resort have upheld verdicts against insurance companies involving questions of liability in health and accident cases, it is refreshing to note that the Supreme Court of the United States has at least laid the foundation for a more conservative standard in these cases. It may not be amiss to suggest that since the Government has been in the insurance business, its courts have been faced with the knowledge that if the rules heretofore announced should be continued they would permit unrestricted recoveries in war risk cases. It may be that there is and should be a difference between a claim for disability against the United States and an entirely similar claim against a corporate insurance company, but that distinction has not yet been suggested in the opinions and we are hopeful that it will not be. It is certain, however, that regardless of what the cause may be, the Supreme Court of the United States has turned its face away from the unduly liberal construction of insurance policies and the liberal consideration of the proof required to support an action thereon, and it is most satisfactory to note that at least one of our state courts has followed this principle.

In the case of *United States of America v. Spaulding*, 79 L. Ed. 251, decided January 7, 1935, it appeared that Spaulding enlisted in the Navy in 1917, was commissioned and

became an air pilot, and was discharged in 1922. In 1919 he contracted kidney trouble which continued for several years, and in 1921 he was in an airplane crash and remained in the hospital until February, 1922. At the time of his discharge he was found not physically qualified for active duty, but he made no claim for disability. From February, 1923, until April, 1924, he took vocational training, and then for a year was employed as an automobile salesman at which he earned a living, and beginning September 1, 1925, he was employed as superintendent of construction at a salary of \$300.00 a month, and for several years thereafter he was gainfully employed, although he testified that all of his employments were because of the necessity of earning a living for his family. In July, 1924, as a result of an examination, he was certified as being qualified for flying duty as a pilot. His war risk policy which provided compensation for total disability, whatever its cause, lapsed on November 30, 1923, and he instituted suit to recover on the policy on March 15, 1932, alleging that he was totally and permanently disabled before the lapse of the policy. Three physicians, some of whom had treated Spaulding, testified that he was totally and permanently disabled before the policy lapsed, but the court concluded that this evidence was not sufficient to justify the submission of the case to the jury and that a verdict should have been directed for the

United States upon the admitted facts set out above. It is assumed in the opinion that the mere fact that a claimant has done some work after the onset of his disability does not defeat his claim that he was then totally and permanently disabled, but it concludes definitely that where a claimant has worked over so prolonged a period as did Spaulding in the case considered that as a matter of law he was not totally and permanently disabled. The opinion says:

"The medical opinions that respondent became totally and permanently disabled before his policy lapsed are without weight. Clearly the experts failed to give proper weight to his fitness for naval air service or to the work he performed, and misinterpreted 'total permanent disability' as used in the policy and statute authorizing the insurance. Moreover, that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phrase and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case."

In the case of *United States v. Sullivan*, 74 Fed. (2d) 799, *Sullivan*, whose war risk policy was then in force, undertook to recover for total permanent disability alleged to exist in August, 1932, as a result of an accident while he was in the service and which had gradually brought on his disability. *Sullivan* was a farmer and continued to do his work from the time of his discharge in 1919 until the suit was brought, but with increasing disability. Upon the trial of the case one of his physicians was given the policy definition of total and permanent disability and asked whether *Sullivan* was so disabled in August, 1932. The Government objected to the question and answer given which tended to show that *Sullivan* was so disabled, and in line with the quoted paragraph from the *Spaulding* opinion, *supra*, the Circuit Court of Appeals for the Ninth Circuit reversed the judgment and held that the answer to this question even by an expert invaded the province of the jury and the objection thereto should have been sustained. Although the question is not discussed, it appears that this decision is rested upon the sound ground that even though an expert may testify as to whether a claim-

ant is unfitted to do any kind of labor, yet he may not be permitted to testify that the disability comes within the insuring clause of the policy. In this case the Court held that the claimant had introduced sufficient evidence to justify the submission of the case to the jury and the case was reversed solely to the admission of the doctor's testimony, but the question was reserved as to whether the evidence was sufficient to sustain the verdict.

In the very recent case of *Prudential Insurance Company of America v. Howard's Assignee*, 258 Ky. 366, decided March 12, 1935, the policy issued February, 1925, insured against total and permanent disability, and it lapsed February 1, 1929. In 1910 *Howard*, who was a locomotive fireman, fell from his engine and received a severe blow on the head which rendered him unconscious and kept him from work for about three months. In 1918 he was promoted to engineer and continued as such until December, 1928, when by accident his foot was shot off. About four years after the policy lapsed, *Howard's* assignee brought suit claiming that as a result of the accident in 1910 he had become so disabled as to disable him totally and permanently, and he undertook to support this theory by his own testimony that in 1927 he began to have severe headaches accompanied by a pressure on the skull and inability to talk naturally. The evidence showed that in 1929 after he procured an artificial foot, he sought reinstatement as an engineer, but was turned down solely because the rules of the company did not permit the employment of an engineer with one foot. It also appears that he was paid a specific disability for the loss of his foot, and at that time he made no claim for total disability. In October, 1929, eight months after his policy lapsed, he made application for insurance in another company and said that he was not suffering from brain or nervous trouble. Several physicians testified that *Howard* was totally and permanently disabled before the lapse of the policy, but it was shown by other physicians who examined him, especially at the time of his application for reinstatement as an engineer, that he had no such disability. The lower court submitted the case to the jury which rendered a verdict for plaintiff, but on appeal the Court points out that the opinion of plaintiff's doctors that he was totally and permanently disabled before the policy lapsed is worthless because of the admitted facts that he was working regularly and was in good physical

condition, except for the amputation of his foot. The Court relies heavily upon the Spaulding case, *supra*, and approves the rule announced therein.

We believe and earnestly hope that this is but the beginning of a new and changed attitude upon the part of our state courts toward disability claimants who are not actually disabled and who have heretofore been permitted to recover upon the sole ground that the insurance company was able to pay and that the claimant needed the money.

As manifesting the desire of the courts to see an insured recover and searching out a way to permit it, we think the case of Federal Union Life Insurance Company v. Richey's admx., 256 Ky. 262, decided October 12, 1934, presents the most extreme illustration that we have ever seen. In that case, Richey held what is known as a travel and pedestrian policy which insured against death by accidental means sustained in the wrecking or disablement of an automobile in which the insured is riding. Richey was riding to his work on a Ford truck which collided with a Studebaker sedan, and as a result of the collision, the front and left wheels of the truck were lifted about eighteen inches off the ground and Richey was thrown therefrom and killed. The only damage to the truck was a slight dent or bending of the left front fender. It was regularly used thereafter, operated as usual, and no repairs were made to it for six months after the accident. The judg-

ment of the lower court granting plaintiff a recovery under the policy was affirmed with this explanation:

"The proper action of an automobile requires that all four of its wheels remain upon the ground or pavement on which it is then standing or running. This accident rendered this automobile momentarily incapable of proper action. Whatever else may or may not amount to a disablement, the facts proven in this case certainly did so."

Your Committee earnestly recommends to the attention of the members of this Association that every effort should be made not only to see that every insurance case is properly decided, but that the courts which have them under consideration are fully advised on the questions involved so that the opinions rendered will be authority in future cases. If we can induce our state courts to approve and follow some of the principles announced by the Federal courts, particularly in health and accident insurance cases, we will have gone a long way toward accomplishing a real benefit not only for our Association and insurance companies, but also to the insuring public generally.

SAM H. MANN, JR., *Chairman*.
JAMES E. COLEMAN.
ROBERT P. HOBSON.
RALPH F. POTTER.
MAURICE H. WINGER.

Report of Secretary and Treasurer

AS Secretary and Treasurer of the Association, and in compliance with its By-Laws, I hereby submit for your consideration my annual report for the period of August 1, 1934, to July 31, 1935.

Membership

The Executive Committee adopted a new form of application blank. This revised application blank furnishes the Association with considerable more data and information on a proposed member than heretofore. We have now two classifications of memberships; those paying \$12.00 per year and others paying \$3.00 per year. This classification was brought about through the revision of our By-Laws which were revised last year and

became effective January 1, 1935. (See Article V, Section 1.)

All proposed applications for new memberships were carefully investigated. Insurance companies given as references on the application blanks were communicated with to ascertain the eligibility and standing of the proposed applicant. The State Membership Committee subsequently passed on the applicant's qualifications and standing. This data was then referred to the members of the Executive Committee who took appropriate action on the applications.

During the period covered by this report, we have had: Cancellations, 2; deaths reported, 10; resignations, 60; delinquents, 78.

Our membership as of July 31, 1935, was: \$12.00 memberships, 901; \$3.00 memberships, 81; making a total membership of 982.

Year Book and Journal

Last year the Executive Committee combined the Year Book and the Journal. Since our last meeting, there have been four issues of the Journal, to-wit—October, 1934; January, April and July, 1935. During the past year, a number of members have written to me expressing disappointment on the discontinuance of a Year Book. There seems to be a sentiment among some of our members that there should be a Year Book issued carrying the full proceedings of the annual meeting, including all papers read at the convention, such book to be compiled and bound in such form that it could be kept as a permanent record in the library of a member or an insurance company. Inasmuch as I have had communications on this matter, I deem it my duty to bring the matter to your attention so that the members may express themselves as to whether they desire the Association to publish and distribute an annual Year Book.

During the year, my office has handled for the Association 5,115 pieces of mail. This was divided as follows: 1,640 pieces of incoming mail; 3,475 pieces of outgoing mail. Of the outgoing pieces of mail, 1,502 were letters of such character as demanded my personal attention and such letters were personally dictated by me.

Midwinter Meeting

The Executive Committee held a midwinter meeting at New Orleans, Louisiana, last January which meeting I attended as Secretary and Treasurer.

Annual Statement

Hereto appended is the financial statement of the Association which covers a period from August 1, 1934, to July 31, 1935.

The books, records, accounts and bank balances of the Association have been audited by a Certified Public Accountant and he certifies as to their correctness and his certification is hereto attached.

I desire to express to all Officers, Members of the Executive Committee and all Special Committees my deep appreciation for their hearty co-operation during the year.

All of which is respectfully submitted.

JOHN A. MILLENER,
Secretary and Treasurer.

REPORT OF SECRETARY AND TREASURER FINANCIAL AND MEMBERSHIP REPORT

August 1, 1934 to July 31, 1935

MEMBERSHIP

July 31, 1935

Cancellations	2
Deaths Reported	10
Resignations	60
Delinquents	78
New \$12.00 Memberships	53
 \$12.00 Memberships	 901
\$3.00 Memberships	81
 Total Membership	 982

FINANCES

July 31, 1934

Buckeye Bldg. & Loan Co., Columbus, Ohio	\$ 574.74
Genesee Valley Trust Co., Inactive Account	1,253.63
Genesee Valley Trust Co., Active Account	4,341.91

REVENUE

August 1, 1934 to July 31, 1935

From Old Members	\$ 10,784.15
From New Members	589.00
From Additional Members	188.25
From Subscriptions	35.00
Interest on Bank Balances	42.45
	<hr/>
	\$ 11,638.85
	<hr/>
	\$ 17,809.13

DISBURSEMENTS

August 1, 1934 to July 31, 1935

Cost of administering, operating and maintaining the Association which includes printing, postage, office supplies, expressage, telegrams, Executive Committee meeting, annual convention expense 1934, exchange on Canadian checks, Federal tax on checks 1934, publication of combined Journal and Year Book, binder for directory, stenographic services, Secretary's compensation, etc.	\$ 8,876.36
	<hr/>
	\$ 8,932.77

BANK BALANCES

July 31, 1935

Buckeye Bldg. & Loan Co., Columbus Ohio	\$ 449.64
Genesee Valley Trust Co., Active Account	4,062.05
Rochester Trust & Safe Deposit Co., Inactive Account	4,421.08
	<hr/>
	\$ 8,932.77

Cumulative Index of Addresses and Articles Appearing in Insurance Counsel Journal and Year Book 1928 to 1936

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- "Standard Automobile Insurance Policy," by R. G. Rowe. (Journal—October, 1934).....Page 19

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